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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DEBORAH CASSILLY, in her capacity as owner and operator of Bo Peep Day Nursery,
Petitioner,

v.

MARYLAND DEPARTMENT OF HUMAN RESOURCES, MARYLAND DEPARTMENT OF HEALTH AND MENTAL HYGIENE, HARTFORD COUNTY HEALTH DEPARTMENT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTION PRESENTED

In a proceeding to revoke a day care license on the grounds that young children were sexually abused, is it a violation of the Due Process Clause for the tribunal to deny the licensee's motion to have her own accredited expert interview the children and thereafter base revocation of the license upon the children's out-of-hearing statements and the testimony of experts for the State who were permitted to interview the children and interpret their accounts?

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OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported as *Maryland Department of Human Resources v. Bo Peep Day Nursery*, 317 Md. 573, 565 A.2d 1015, 58 U.S.L.W. 2312 (1989) and is reproduced at Appendix 1a.

The opinion of the Circuit Court for Harford County, Maryland, is unpublished and is reproduced at Appendix 36a.

The administrative decisions in this case, including the final decision of the State of Maryland, Depart-

ment of Health and Mental Hygiene and Department of Human Resources, the proposed decision of the Hearing Examiner, and the initial decision of the Harford County Health Department revoking Petitioner's day care license, are unpublished, and are reproduced at Appendix 76a, 77a and 136a, respectively.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals of Maryland was issued on November 13, 1989. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, Section 1, provides in pertinent part as follows:

> [N]or shall any State deprive any person of life, liberty or property, without due process of law. . . .

STATEMENT OF THE CASE

Deborah Cassilly (Petitioner) held a license issued by the State of Maryland that permitted her to operate a day care center. Her license was revoked upon administrative findings that some of the children attending her center, almost all of whom were three or four years old, were victims of physical and sexual abuse. The children did not testify at the hearing, but their parents and experts who interviewed the children testified to statements the children made outside the hearing and expressed opinions, based upon the interviews, that abuse occurred at Petitioner's day

care center. Petitioner's pre-hearing request to have accredited experts of her choosing interview the children was denied. After issuance of the final administrative order revoking her license, Petitioner sought review by the Circuit Court for Harford County, Maryland. That Court held that Petitioner's right to due process under the Fourteenth Amendment of the United States Constitution was violated, since the credibility of the children's out-of-hearing statements was essential to the case. Appendix 36a, 52a-60a. That decision was in turn reversed by the Maryland Court of Appeals, which found that no due process right had been violated. Appendix 1a, 20a-28a.

The background of the case regarding the issue before the Court is straightforward. Bo Peep Day Nursery ("Bo Peep"), was a day care center located in Bel Air, Harford County, Maryland. It was conducted by Petitioner as licensee and director. Appendix 2a. The center occupied the first two floors of a three-story building, with the top floor containing an apartment that was occupied until July 1987, by Petitioner, her husband, and their two children. During the winter of 1986-87, total enrollment at Bo Peep was eighty children, with up to sixty children present at any one time. Appendix 3a. Petitioner had worked at Bo Peep since 1979, her first year in college, and purchased the center in 1984. Appendix 2a.

On June 18, 1987, the mother of two children attending the nursery sent a letter to the Maryland Department of Social Services alleging that one of her children was sexually abused at Bo Peep. Appendix 37a n.1. The State, in response, organized a meeting on June 25, 1987, of parents of children enrolled at the nursery, at which the State advised the

parents of the allegations made against Bo Peep and alerted them as to "warning signs" of sexual abuse. Appendix 94a. Shortly thereafter, on July 6, 1987, Petitioner received a letter from the Harford County Health Department advising her that her license was being suspended. Petitioner appealed the suspension order to the Maryland Department of Health and Mental Hygiene, which held hearings in August and September, 1987, before William F. Clark, as Hearing Examiner. Mr. Clark issued a proposed decision upholding the suspension, and a final agency decision suspending the license was issued on March 23, 1988. This suspension was then appealed to the Circuit Court for Harford County but the issue became moot, since the license was permanently revoked while the case was pending in the Circuit Court. Appendix 45a-47a.

The present petition arises out of the revocation proceedings. On March 26, 1988, the Harford County Health Department sent Petitioner a letter "permanently revoking and denying renewal" of her day care license. Appendix 136a. This decision was followed by an administrative hearing, once again before Mr. Clark, which extended over nine days, between May 11 and June 8, 1988. Appendix 78a. Prior to these hearings, on May 2, 1988, Petitioner's attorney requested that the State make the children involved in the allegations of sexual abuse at Bo Peep available for interviews by Petitioner's own health experts and advised the Hearing Examiner that, should this request be denied, he would "move to exclude from the proceeding, on the grounds of violation of due process and fundamental fair play, the use by the State of

any evidence derived from information to which we were denied access." Appendix 5a-6a.

The Hearing Examiner denied Petitioner's request to have her own expert interview the children, but nevertheless relied extensively on out-of-hearing statements by the children related during the hearing by their parents and by experts who testified for the State. The Hearing Examiner also relied on opinion testimony that purported to interpret statements made to these witnesses and expressed conclusions that the children's statements indicated to them that physical and sexual abuse occurred at Bo Peep. Allegations of physical and sexual abuse were made against the Petitioner's husband, who lived with the Petitioner in the family apartment on the third floor, against a senior staff person at the center, and to a lesser extent, against Petitioner herself.

The Hearing Examiner issued a proposed decision on August 23, 1988 upholding revocation of Petitioner's license. He relied upon the testimony offered by the State's experts both as to statements made by the children and the experts' interpretations of them, expressly finding that "the observations made by these licensed therapists who testified about their sessions with the children is more credible than the expert opinion offered by the Appellant's witness, who merely read a cold record." Appendix 104a. The Hearing Examiner attached special importance to the role of the expert in interpreting statements of small children. In fact, he alluded to that role, as follows, in his analysis of the conflicting expert testimony and his reasons for relying upon the State's experts rather than Petitioner's:

> [Petitioner's expert's] opinion must also be discounted because he has not given sufficient consideration to the fact that the statements of the children cannot uniformly be taken literally, but must be interpreted in light of the children's perceptions and developmental levels, given the fact that these children, on account of their young age, do not possess the experience, mental capacity or vocabulary to efficiently and accurately convey their observations like adults do.

Appendix 104a-105a.

The Hearing Examiner cited the testimony of parents and therapists, along with the testimony of two physicians to whom the State had referred many of the children who attended Bo Peep.[1] In a number of cases these witnesses described symptoms that they stated were consistent with sexual abuse. Appendix 103a. The Hearing Officer did not, however, link any child's description of sexual abuse with a particular physical sign on the child, and no testimony was heard from the children themselves. The Hearing Examiner emphasized the similarities between the testimony received and the findings of a study by the University of New Hampshire on sexual abuse in day care, Appendix 103a, 110a-135a, and used this study to justify his conclusions concerning the kinds of evidence which he found to be indicative of sexual abuse. *See* Appendix 103a, 110a.

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[1] Petitioner filed a motion on June 30, 1988 seeking to have the Circuit Court for Harford County order physical examinations by Petitioner's own expert of the children alleged to have been sexually abused. This motion was denied on October 25, 1988.

The Hearing Examiner's proposed decision was adopted by the Department of Health and Mental Hygiene and the Department of Human Resources, Appendix 76a, and was immediately appealed to the Circuit Court for Harford County, Maryland. The Circuit Court found that the agency proceeding did not afford Petitioner due process of law and ordered the decision reversed and remanded.

The Circuit Court explained that:

> [T]he children's out-of-hearing statements were *foundational* to the case as the State would not have had a case without these statements. Any evidence from which it could be concluded that the abuse took place at Bo Peep rested upon the credibility on [sic] the out-of-hearing statements of the children. The psychologist, social workers and parents all based their opinions and testimony on the childrens' statements. Without these statements, the psychologist and social workers could not have implicated Bo Peep.

Appendix 52a (emphasis in original). Even though there were allegedly medical signs consistent with physical abuse on a few of the children attending Bo Peep, the State needed to provide evidence linking these signs to abuse at the center. Appendix 52a. Recognizing this fact, the Circuit Court continued:

> Since the credibility of the childrens' out-of-hearing assertions was key to the case, the defense asked for the opportunity to have their psychologist speak to the children. Presumably, this would have permitted the defense to test the credibility or believability

> of the evidence that was never directly before the Hearing Officer (out-of-hearing statements). The request was denied. . . .
>
> Even though not afforded the opportunity to examine the children, the Appellant's psychologist was permitted to review the evidence presented by the State and opined upon the credibility of the out-of-hearing declarations. The Hearing Officer took this testimony as meaningless, since Dr. Donner merely read "a cold record". . . .

Appendix 52a-53a. The Circuit Court observed that "Maryland decisional law has long held that hearsay evidence is admissible in the administrative setting." Appendix 55a. Nevertheless, the Court insisted that "due process in a contested administrative setting requires an opportunity to meet or rebut adverse evidence and when there is no such opportunity, it is error for the administrative agency to rely on the unchallenged adverse evidence." The Court concluded that:

> Appellant was denied due process of law since there was no meaningful opportunity to test the credibility of the childrens' out-of-hearing statements. As previously discussed, their statements were foundational to the case. What is a meaningful opportunity will vary from case to case. We first observe that cross-examination did little to test credibility since the respective declarants were not at the hearing. In this situation, a meaningful opportunity would have resulted if Dr. Donner could have interviewed the children. This

> request was denied. His testimony was totally discounted due to his lack of personal contact. The State will argue that the Hearing Officer had no authority to order the interviews. This is correct, but the Hearing Officer should not have considered any of the evidence which was dependent on the foundational out-of-hearing statements where circumstances prevented an opportunity to challenge. . . . As previously noted, there would be insufficient evidence to conclude that abuse took place at Bo Peep absent the out-of-hearing assertions.

Appendix 58a-59a.

After the Circuit Court's decision the State filed a notice of appeal to the Maryland Court of Special Appeals. While that appeal was pending, however, and before any briefs were filed, the State filed a petition for writ of certiorari to the Court of Special Appeals seeking immediate review of the Circuit Court's judgment by the Maryland Court of Appeals, and immediate review was granted.

The Maryland Court of Appeals considered the issue whether Petitioner had a due process right to have her experts interview the children whom it was alleged were injured at Bo Peep and decided against her.[2] The opinion discusses much of the testimony

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[2] The Court of Appeals noted that the issue of whether Petitioner might have requested subpoenas to have the children testify at the hearing was not before it. Appendix 21a n.6. The State would have had strong arguments for quashing the subpoenas, given that almost all the children were only three or four-years old at the time of the alleged abuse, on grounds of

offered in reference to child number 7 as an example of the allegations against Bo Peep, including her statements to her therapist that she was placed on the kitchen table and sprayed in her private areas with a "water machine" which shoots colored water, Appendix 19a n.5, and that a pink or orange ball had been placed inside her, Appendix 18a. The Court also noted that the child frequently told her therapist that she was "just kidding" after making a statement regarding abuse suffered at Bo Peep Nursery, but that the therapist explained that this was a way of repressing the reality of what had happened. Appendix 18a. The Petitioner's expert provided alternative explanations for all of the child's statements. But the Court found that the fact-finder's reliance upon the out-of-hearing statements was not a violation of due process.

The Maryland Court of Appeals analyzed the issue under the three-factor analysis of *Mathews v. Eldridge*, 424 U.S. 319 (1976), holding that Petitioner only had a property interest at stake and that the State had an important interest in regulating day care and looking after the interests of children. The Court emphasized above all, however, that there would be no gain in terms of the quality of the decisionmaking process in allowing an interview by the Petitioner's expert.

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the harmful psychological effects testifying might have on a child, and on the basis of the incompetence of the children to testify. Although the children were a year older by the time of the revocation hearings, it is likely that many would have been unable to offer coherent testimony. Thus Petitioner's attorneys' decision to proceed though interviews by medical experts, as a more productive procedure than cross-examination at an open hearing, was not questioned by any of the lower courts.

The Court's reasoning on this point analyzed four ways that the Court believed exhausted the possible ways in which Petitioner could have been prejudiced. These ways were stated as follows:

> First, the content of the declarant's statement may be false. Secondly, an adult witness, either intentionally or unintentionally, may have inaccurately conveyed the declarant's statement to the decision maker. Third, the adult witness may have drawn an erroneous conclusion from the declarant's accurately reported statement. Fourth, the adult witness may have accurately communicated the declarant's statement, as far as it goes, but may have omitted other matter never explored, or deemed by the witness to be insignificant, but which would be significant to some other evaluator.

Appendix 25a-26a.

Each possibility was then taken up and discussed separately. The first possibility—"that some or all of the children are lying"—was disposed of by the Court's acceptance of a controverted thesis of child psychology. The Court, quoting from a psychology journal article, stated:

> Young children almost never initiate false allegations without influence from an adult. Commonly an adult, either unconsciously or consciously, is intent on proving to themselves or others that the allegations of abuse are true. The child is thus influenced by the adult to present with a false allegation.

Appendix 26a. Due process, in the opinion of the Court, was satisfied, because, "Bo Peep either cross-examined or had the opportunity to cross-examine or subpoena any adult who may have influenced any child falsely to describe an occurrence at Bo Peep." Appendix 27a.

The second and third possibilities for error identified by the Court—inaccurate conveyance of the child's statement and erroneous conclusions from an accurately-quoted statement—were brushed aside by the Court with the reasoning that those who testified concerning statements made by the children were subject to cross-examination and that testimony given by the State's witnesses permitted Petitioner to develop such limited rebuttal as Petitioner did present. The Court thus disposed of the first three "possibilities" of error by relying upon the assumption that "children never lie unless adults influence them" and concluding that the State's adult witnesses gave Petitioner enough information about the content and meaning of the children's statements—and their demeanor while making the statements—even though neither Petitioner nor her experts were granted the right to question the children. Appendix 27a.

As to the fourth possibility for error—omissions by the adult witness—the Court stated:

> [A]lthough there was undoubtedly some risk that an adult witness might not have explored or communicated some facet of a child's life which Bo Peep's expert would consider relevant, Bo Peep had the opportunity, by cross-examination of the adult witnesses, to explore omissions by them, and Bo Peep

> had the opportunity to argue that omissions had invalidated the witnesses' conclusions.

Appendix 27a. The Court then added that "it appears that Bo Peep's desire to test the 'credibility of statements' is a desire to discover additional data which could be used by its expert to support conclusions favorable to Bo Peep and thereby perhaps enhance the possibility that the decision maker would accept those favorable opinions." Appendix 27a. The unexceptional nature of this "desire" goes without acknowledgement in the Court's opinion. Instead, the Court, while not disputing the Circuit Court's insistence that the children's out-of-hearing statements are essential to the State's case, held that the possibility that Petitioner would have improved its case by expert interviews of children who allegedly suffered abuse at Bo Peep "is slight because of the number of children at Bo Peep who bear physical signs consistent with their having been sexually abused." Appendix 27a.

REASONS FOR GRANTING THE WRIT

I. THIS PETITION PRESENTS ISSUES SIMILAR TO THE ISSUES THIS COURT WILL REVIEW IN *IDAHO v. WRIGHT* BUT INTRODUCES ADDITIONAL ALTERNATIVES.

The instant case presents many of the same questions present in *Idaho v. Wright*, 116 Idaho 382, 775 P.2d 1224 (1989), *cert. granted*, 58 U.S.L.W. 3443 (U.S. Jan. 16, 1990) (No. 89-260), but in the context of an administrative proceeding where Petitioner's use of experts and her ability to cross-examine the State's experts were also severely hampered by the State. In *Idaho v. Wright*, the Idaho Supreme Court held

that admission of an out-of-court statement of a young victim of sexual abuse made to an examining pediatrician was unconstitutional. Admission of the testimony was held to be in violation of the Confrontation Clause because the interview was unrecorded, leading questions were used and the examining pediatrician had a preconceived idea of what the child should be disclosing, 775 P.2d at 1227. The Idaho Supreme Court found that under such circumstances the statements could not be regarded as providing the "'particularized guarantees of trustworthiness' required to withstand objection pursuant to the Confrontation Clause," 775 P.2d at 1230. *See Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980), establishing the "particularized guarantees of trustworthiness" requirement.

In contrast, the Maryland Court of Appeals has upheld revocation of Petitioner's day care license—and the consequent loss of her reputation, her business and her livelihood—where the hearing examiner's decision was founded upon out-of-hearing statements that were not recorded, that in many cases were made only after extensive questioning of the child, and that in most cases were made to parents who had been recently alerted by the State at the June 25, 1987 meeting that Bo Peep Nursery was under investigation, or were made to professionals alerted by parents or other professionals regarding the possibility of sexual abuse. Furthermore, the statements made to the pediatrician in *Idaho v. Wright* required little interpretation. The child specifically stated that she and her father touched each other's sexual organs, testimony which was far more indicative of a common form of sexual abuse than most of the testimony received regarding sexual abuse at Bo Peep, see *supra*

p. 7, 10-11 and Appendix 19a. Many of the out-of-hearing statements recounted by the State's experts below required interpretation by the testifying expert.[3]

The courts have been unable to produce a satisfactory solution to the problem of child hearsay in sexual abuse cases. Some courts have used liberal application of hearsay exceptions to admit the out-of-court statements of children even when they have recognized that the children were incompetent to testify as witnesses in court. *See Morgan v. Foretich*, 846 F.2d 941, 946 (4th Cir. 1988); *Haggins v. Warden, Fort Pillow State Farm*, 715 F.2d 1050, 1057 (6th Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984); *People v. District Court of El Paso County*, 776 P.2d 1083, 1087-88 (Colo. 1989); *Perez v. State*, 536 So.2d 206, 210-211 (Fla. 1988), *cert. denied*, 109 S.Ct. 3253 (1989); *State v. D.R.*, 109 N.J. 348, 537 A.2d 667, 677-79 (1988). Other courts have refused to find "particularized guarantees of trustworthiness" under essentially identical circumstances. *See State v. Boston*, 46 Ohio St. 108, 545 N.E.2d 1220, 1238-39 (1989); *State v. Ryan*, 103 Wash.2d 165, 691 P.2d 197, 203 (1984). The admission of the out-of-court statements of young children presents a serious due process problem, and the instant case suggests a solution which has not been previously presented to this Court. Under the rule adopted by the Circuit Court below—but rejected on appeal—the out-of-court statements of

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[3] For example, much of the abuse recounted by child number 7 was performed by "Big Foot". This child was also allegedly subjected to harmful treatment by a "water machine" which was brought down from the attic and placed on the kitchen table. Appendix 19a.

young children would be admissible so long as the defendant was given a reasonable opportunity to have a competent medical professional interview the children.

There is no easy format for eliciting reliable testimony from young children. An interview of the alleged victims by the defendant's experts, however, is probably the most meaningful form possible for challenging the out-of-court statements of children and the in-court statements of the State's experts. Many courts are presently relying on the out-of-court statements of small children to provide them with basic evidence in child abuse cases, insisting that such statements are just as reliable as in-court testimony. For example, in *Nelson v. Farrey*, 874 F.2d 1222 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 835 (1990), involving the sexual abuse of a three-year old who was found by the trial court to be unavailable to testify because of the emotional trauma testimony would involve, the Seventh Circuit held:

> Events conspired to prevent [the defendant] from having a chance to cross-examine his principal accuser. He *was* convicted on hearsay evidence. But we should not allow labels and lawyers' pieties to delude us into believing that cross-examination of a four-year-old child concerning sexual abuse by her father a year earlier is a more effective method of discovering the truth than listening to and weighing the testimony of a competent psychologist who interviewed the child over a period of many months in a setting designed to elicit truthful communication. There is no basis for believing that [the child's] testifying

> would have enhanced the accuracy of the jury's determination. "[A] growing number of experts argue that the testimony of child-abuse victims is more reliable if they *cannot* see the defendant."

874 F.2d at 1230 (emphasis in original). *See also United States v. Cree*, 778 F.2d 474, 478 (8th Cir. 1985); *United States v. Nick*, 604 F.2d 1199, 1204 (9th Cir. 1979); *cf. Coy v. Iowa*, 108 S.Ct. 2798, 2809 (1988) (Blackmun, J. dissenting), noting that the psychological impact on a child of testifying in court may undermine the truth-finding function of the trial itself; *Maryland v. Craig*, 316 Md. 551, 560 A.2d 1120, 1125 (1989) *cert. granted*, 58 U.S.L.W. 3443 (U.S. Jan. 16, 1990) (No. 89-478). *But see State v. Gilbert*, 109 Wis.2d 501, 326 N.W.2d 744 (1982).

The Seventh Circuit's reasoning in *Nelson*, that calling a three- or four-year old victim to the stand is less useful than an interview by a psychologist, is correct, but it is inconceivable that due process should require placing the defendant completely at the mercy of the State's experts. Such an approach assumes that the State's experts are infallible in their observations and may, with no checks on the process, act as a) therapists; b) investigators; c) preservers of the child's account; d) expert witnesses and interpreters of the child's account; and e) advocates for the child, all rolled into one. *See* Hutton, *Child Sexual Abuse Cases: Reestablishing the Balance Within the Adversary System*, 20 U. Mich. J. Law Reform 491, 505 (1986). In the instant case, Petitioner proposed a solution in the form of interviews by her experts, one of the few practical alternatives that allows the State to present its case yet also allows the defense a right

of confrontation consistent with both the interests of the child and the need to adopt fair procedures to protect the rights of the accused.

II. THE BO PEEP DECISION MISAPPLIES *MATHEWS v. ELDRIDGE*

The three-part standard articulated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) governs the instant case. Due process in any kind of adjudicatory proceeding, whether criminal, civil or administrative, requires a weighing of 1) the private interests at stake; 2) the risk that the procedures used will produce an erroneous result and the probable value of the suggested procedural safeguard; and 3) the governmental interests affected. *See Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (criminal proceeding imposing the death penalty), *Little v. Streater*, 452 U.S. 1, 6 (1981) (civil paternity action) and *Mathews v. Eldridge*, 424 U.S. at 335 (social security disability benefits). The Maryland Court of Appeals acknowledged the applicability of the *Mathews v. Eldridge* factors, but employed them in a manner which is inconsistent with *Mathews v. Eldridge* and its progeny.

A. The Maryland Court of Appeals Understated the Private Interests At Stake.

The Maryland Court of Appeals described the private interest at stake in the instant case as Petitioner's "continued operation of a day care center on the premises." Appendix 23a. That narrow interest certainly was the focus of the proceedings, but the real interests in the case were much greater. Petitioner holds a bachelor's degree in early childhood education, Appendix 2a, and was both licensee and director of the center. Appendix 37a. Petitioner had satisfied the exacting state requirements to act as a

director for centers licensed for more than 40 children.[4] She is held responsible by both the public and the State for any misconduct that is thought to have occurred at Bo Peep. Important personal liberties are destroyed whenever government action creates a serious likelihood of stigma that may affect future employment opportunities, *Arnett v. Kennedy*, 416 U.S. 134, 155-158 (1974); *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972). In recognition of this fact, proceedings for the revocation of a professional license have been regarded as quasi-criminal in nature, *see e.g., In re Ruffalo*, 390 U.S. 544, 551 (1968) (disbarment proceedings); *Shively v. Stewart*, 65 Cal.2d 475, 55 Cal. Rptr. 217, 220, 421 P.2d 65, 68 (1966) (physician's license); *Maul v. State Board of Dental Examiners*, 668 P.2d 933, 937 (Colo. 1983) (dental

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[4] Md. Regs. Code 10.05.01.53 (1989) provides:

> Directors in centers licensed for more than 40 children shall meet all of the following requirements:
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> A. Be at least 21 years old;
>
> B. Be a graduate of an accredited 4 year college or university;
>
> C. Have had 2 years of experience under supervision working with a group of children in a licensed early childhood program and shall have demonstrated ability to work with parents and other adults in the community;
>
> D. Have completed 64 classroom hours in early childhood curriculum and child development specifically directed to the needs of children, 2 to 6 years old;
>
> E. They shall either indicate continued training or hold a valid Child Development Associate Credential from the Child Development Associate Consortium.

license); *Snell v. Commonwealth State Examining Board*, 490 Pa. 277, 416 A.2d 468, 470 (1980) (dental license). In the present case Petitioner not only has been destroyed professionally, but has been branded a "child abuser."

B. The Maryland Court of Appeals Severely Misconceived the Risk of Erroneous Result and the Probable Value of the Procedures Suggested.

The Maryland Court of Appeals and the Hearing Examiner proceeded on the assumption that children do not lie unless prompted or misled by an adult. Showing ardent faith in a single current of psychological literature the Court of Appeals stated:

> The first possibility is that some or all of the children are lying. The authors of the article, "*Assessing the Credibility of Young Children's Allegations of Sexual Abuse: Clinical Issues*," *supra*, discuss the situations commonly associated with false allegations.
>
> "Young children almost never initiate false allegations without influence from an adult."

Appendix 26a. Then the Court reasoned that since the Petitioner had the opportunity to cross-examine the expert witnesses and parents concerning the manner in which they might have influenced the children to make out-of-hearing statements, the Petitioner had nothing to gain by her requested opportunity to interview the children directly. Appendix 27a.

This logic is extremely weak. First, the concept that *children never lie* without the influence of an adult does not enjoy general scientific acceptance. Children may lie for a variety of reasons both related and unrelated to the adults around them, *see*, Mantell,

Clarifying Erroneous Child Sexual Abuse Allegations, 58 Am. J. of Orthopsychiatry 618 (1988); Yates & Musty, *Preschool Children's Erroneous Allegations of Sexual Molestation*, 145 Am. J. Psychiatry 989 (1988); Green & Schetky, *True and False Allegations of Child Sexual Abuse*, in CHILD SEXUAL ABUSE: A HANDBOOK FOR HEALTH CARE AND LEGAL PROFESSIONALS 104, 108-09 (D. Schetky & A. Green, eds. 1988); Benedek & Schetky, *Problems in Validating Allegations of Sexual Abuse. Part 1: Factors Affecting Perception and Recall of Events*, 26 J. of the Am. Academy of Child & Adolescent Psychiatry 912 (1987). Adoption of the notion that children never lie as a legal fiction should not be used to eliminate essential due process safeguards in child abuse cases.

Second, even if one assumes as a proven scientific fact that children never lie unless they have somehow been influenced by an adult, the interview of the child by defendant's psychologist will often be the only fashion through which the influences upon the child will be made apparent. Sometimes children will be coached by an adult abuser to attribute abuse to a third party, *see Nelson v. Farrey*, 874 F.2d at 1225 (7th Cir. 1989); sometimes there may be tensions in a child's home environment which lead to false accusations or to fantasies which some psychologists interpret as indicative of abuse; sometimes pressures from a therapist or resulting from the State's investigation lead to accusations,[5] Mantell, *supra* at 620;

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[5] Most of the children making out-of-hearing statements regarding physical or sexual abuse at Bo Peep came from homes where the parents had undergone a recent divorce or where there was a serious problem of alcohol abuse. See the testimony analyzed by the hearing examiner regarding children 4, 6, 15

Spiegel, *Child Abuse Hysteria and the Elementary School Counselor*, 22 Elementary School Guidance & Counseling 275, 279-80 (1987); James, *Child Protection Workers' Role in Erroneous Allegations of Child Abuse*, 146 Am. J. Psychiatry 564 (1989). In the instant case it is even possible that children made up stories because they hate day care.[6] The value of cross-examination of the adult conveying the out-of-court statement will always be limited when the defense has not had the opportunity to interview the child.

The decision of the court below is in striking contrast to a recent decision of the Supreme Court of Kentucky. In *Turner v. Commonwealth*, 767 S.W.2d 557 (Ky. 1988), *cert. denied*, 110 S.Ct. 260 (1989), the Supreme Court of Kentucky ruled that failure to allow a pre-trial medical examination of a four-year old rape victim by defendant's experts was a violation of due process in a case where the State's examination was a significant incriminating factor. The Court found for the appellant because "an independent expert might have permitted the appellant to offer evidence to contradict that offered by the Commonwealth as to whether there were, in fact, any injuries to the hymenal ring," 767 S.W.2d at 559. In the instant case, an interview with the victim by Petitioner's experts was the only manner in which Petitioner might

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and 33. Appendix 80a-81a, 84a, 90a, 91a. In other cases, the Petitioner's expert, Dr. Lawrence Donner, testified that statements were provoked by the stress caused by the State's investigation. Appendix 99a-100a.

[6] Petitioner's expert testified that from the testimony offered by the State several of the children appeared to be suffering from separation anxiety. Appendix 98a, 99a-100a.

have been able to gather evidence showing that there was in fact no sexual abuse at the day care center. *See also Anderson v. State*, 749 P.2d 369, 371 (Alaska App. 1988), requiring examination of young children by a mental health practitioner.

Furthermore, in the instant case, the State's experts were permitted to testify not only as to the statements made to them by the children, but to state that they thought that the children were telling the truth and that the children's statements and conduct indicated that they had suffered sexual abuse at Bo Peep. As a practical matter the State's refusal to order an examination of the children by the Petitioner's experts effectively barred the Petitioner from presenting expert testimony essential for the conduct of her defense, *cf. Ake v. Oklahoma*, 470 U.S. at 82 (1985), and made it impossible for petitioner to prepare an adequate cross-examination of the State's experts, since they based their opinions on material only they had access to, *cf. Pennsylvania v. Ritchie*, 480 U.S. 39, 61-62 (1987) (Blackmun, J. concurring) (noting the need for pre-trial access to information that would make possible effective cross-examination of a key witness).

C. The Maryland Court of Appeals Confused the Government's Interest in Efficient Procedures With the Government's Interest in Only Licensing Day Care Centers Where Children Are Not Sexually Abused.

The Maryland Court of Appeals stated that under the third prong of the *Mathews v. Eldridge* balance, "[w]e must weigh heavily in favor of the State its interest in licensing only day care centers where children are properly cared for and, more particularly, the State's great interest in protecting children from

physical and sexual abuse." Appendix 28a. However, the government interest to be analyzed under the *Mathews v. Eldridge* standard is not the government interest in the legislative end, but "the government's interest in adhering to the existing system." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 321 (1985). "When a State seeks to limit the procedures that will attend the deprivation of a constitutionally protected interest, it is only the State's interest in streamlining procedures that is relevant. . . . A state may not, in other words, justify abbreviated procedures on the ground that it wishes to pay welfare benefits to fewer people or wants to reduce the number of tenured professors on its payroll," *Michael H. v. Gerald D.*, 109 S.Ct. 2333, 2358 (1989) (Brennan, J., dissenting). A process under which young children might be interviewed by the licensee's psychologists, when the circumstances of the case indicate that such an interview is important for the licensee's defense, would improve the reliability of the administrative procedure with no significant effect on the state's ability to close day care centers which do in fact pose a risk to children.

The instant case is only one of hundreds of cases of allegations of sexual abuse which present themselves each year in the day care setting, *See* D. FINKELHOR *et al.*, SEXUAL ABUSE IN DAY CARE: A NATIONAL STUDY, FINAL REPORT, vii (University of New Hampshire, 1988). There were an estimated 155,900 cases of sexual abuse in the United States in 1986. U.S. DEPT. OF HEALTH AND HUMAN SERVICES, STUDY OF NATIONAL INCIDENCE AND PREVALENCE OF CHILD ABUSE AND NEGLECT: 1988, 4-7 (1988). A certain number of cases of children

showing physical signs of sexual abuse is not unlikely in any large day care setting given the possibilities of alternative diagnoses, the generally high level of sexual abuse in our society, *see Morgan v. Foretich*, 846 F.2d 941, 943 (4th Cir. 1988), and acts which children perform on themselves and each other, *see* Cantwell, *Child Sexual Abuse: Very Young Perpetrators*, 12 Child Abuse & Neglect 579 (1988), (noting that young children who are sexually abused will sometimes perform acts on their friends). The high statistics on child abuse may serve to explain, but they cannot justify, the strong impulses of specialists in the field to stress protection of victims even at the expense of the due process rights of the persons they accuse.

CONCLUSION

For the foregoing reasons and on the basis of the authorities cited, a writ of certiorari should issue to review the decision of the Court of Appeals of Maryland in this case.

Respectfully submitted,

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February 12, 1990

APPENDIX

APPENDIX A

Court of Appeals of Maryland.

Nov. 13, 1989.

No. 24, Sept. Term, 1989.

MARYLAND DEPARTMENT OF HUMAN RESOURCES, Maryland Department of Health and Mental Hygiene, Harford County Health Department

v.

BO PEEP DAY NURSERY.

Lawrence H. Norton, Asst. Atty. Gen. (J. Joseph Curran, Jr., Atty. Gen., Ralph S. Tyler, Andrew H. Baida, Daniel J. O'Brien, Asst. Attys. Gen., all on brief), Baltimore, for petitioners.

Paul A. Dorf, Stephen A. Markey, III, Adelberg, Rudow, Dorf, Hendler and Sameth, Baltimore, amicus curiae, for People Against Child Abuse (PACA), Md. Chapter of the American Academy of Pediatrics (AAP), Lawrence Wissow, M.D., Ass'n for Childcare Excellence (ACE), Md. Coalition Against Sexual Assault (MCASA).

Michael Genz, Emily Buss, Tobie Bernstein, Baltimore, amicus curiae, for The Legal Aid Bureau.

Thomas J. Peddicord, Jr. (Thomas G. Young, III, Marlow, Peddicord & Young, P.A., all on brief), Towson, for respondent.

Argued before MURPHY, C.J., and ELDRIDGE, COLE, RODOWSKY, McAULIFFE, ADKINS and BLACKWELL, JJ.

RODOWSKY, Judge.

This is an administrative appeal in a business license revocation case. Appellant, Department of Human Resources, the successor licensing agency, revoked appellee's license as a child care center based on findings, after hearings, that a number of preschool age children were victims of physical and sexual abuse while in appellee's care. Before the proceedings began the agency's hearing officer denied appellee's request for discovery by way of psychological interviews of the alleged victims by an expert selected by appellee. On appeal from the revocation order the circuit court remanded, having concluded that the agency's denial of the discovery request violated appellee's constitutional right to procedural due process. That ruling is the primary issue before us. For reasons set forth below, we shall reverse and direct affirmance of the agency's order.

Child care centers are licensed and regulated by the State. Prior to July 1, 1988, the licensing authority was the county health officer, while the authority to review a health officer's decisions and to adopt regulations was in the Department of Health and Mental Hygiene. Md.Code (1982, 1987 Repl.Vol.), §§ 14-101 through 14-114 of the Health-General Article. By Ch. 247 of the Acts of 1988, authority to administer this regulatory licensing system was lodged in the Department of Human Resources. See Md.Code (1984, 1989 Cum. Supp.), §§ 5-570 through 5-585 of the Family Law Article. The license year runs from April 1 through March 31.

Bo Peep Day Nursery (Bo Peep) is a child care center conducted by Deborah Cassilly (Deborah) who is the licensee. The center is conducted on premises improved by a free-standing three story building in Bel Air, Harford County. Deborah, who holds a bachelor's degree in early childhood education, had worked while she was in school at a child care center conducted on those premises. In January 1984 Deborah, then approximately twenty-three years of age, and her husband, Patrick Cassilly (Patrick),

purchased the property from the prior owners/operators. The first two floors of the building are used for the child care facility. There are four classrooms, an office, a kitchen and a restroom on the first floor, and there are four classrooms and a restroom on the second floor. Until late July 1987, Deborah, Patrick and at that time their two children occupied the residential apartment on the third floor of the building.

Not every child who is enrolled at Bo Peep comes to the care center every day and not every child who comes to the center remains there the entire time the center is open. In the winter of 1986-87 the total enrollment at Bo Peep was approximately eighty children of whom no more than sixty were present at any one time. By May 1988 the enrollment was fifty-two children and the maximum number of enrollees at any one time was thirty-three.

In the period September 1986 through June 1987, a typical day at Bo Peep would proceed in the following fashion. Bo Peep began receiving children at 6:30 a.m. The children played on the first floor until approximately 8:00 a.m. when those children who attended kindergarten or grade school were taken by Bo Peep staff to their respective schools. Those enrollees who remained at Bo Peep for part or all of the rest of the day were divided into groups for the morning structured programs. The three year old group stayed on the first floor. The four year old and five year old groups were in classrooms on the second floor. Lunch was served around midday. From approximately 12:30 to 2:30 p.m. was nap time for the three and four year olds. No more than ten children utilized a classroom on the first floor for napping with any overflow using a second classroom on that floor. After their naps, the children watched TV, had a snack around 3:00 p.m., and played games of their choice until their parents or others took them home.

State regulations for child care centers require that a supervisory senior staff person be present at all times that enrolled children are on the premises. Md.Regs. Code tit. 10, § .05.01.58 (185) (COMAR).[1] The operator of a center must periodically file staffing schedules with the regulating agency. COMAR 10.05.01.60 (1985). At Bo Peep Deborah usually scheduled herself for the early morning and late afternoon hours when parents would be coming to the facility. During much of 1986-87 the senior staff person scheduled to supervise at Bo Peep from 8:30 a.m. to 11:30 a.m. was Rita Blevins (Blevins), who had been employed there from February of 1985. Patrick was not one of the regular staff at Bo Peep. He was employed at an automobile dealership.

In July 1987, the Harford County Health Officer wrote Deborah advising that Bo Peep's license would be suspended. Three days later the Circuit Court for Harford County (Carr, J.) enjoined adult males from the Bo Peep premises from 6:30 a.m. to 6:30 p.m. Monday through Friday. On July 27, 1987, after four days of hearings, that court (Whitfill, J.) barred Patrick from the premises at all times, ordered a log to be kept of all male visitors, and directed the Bel Air Police to make random checks at Bo Peep.

Bo Peep appealed the health officer's suspension order. William F. Clark, Esq. (Clark), the chief hearing examiner in the Department of Health and Mental Hygiene, conducted hearings over seven days in August and September and recommended suspension of the Bo Peep license for the remainder of its term. In his report, which was adopted by the departmental secretary's designee, Clark made the following ultimate finding:

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[1] The cited regulations of the Department of Health and Mental Hygiene continue in effect under the Secretary of Human Resources pursuant to the transfer provisions in SECTION 4 of Ch. 247 of the Acts of 1988.

> "I conclude that the facts as found in Part XI reflect that many children of Bo Peep were subjected to injurious treatment. Chief among those problems . . . is that children at Bo Peep have been sexually abused. The evidence in this case points in no other direction. While sexual child abuse is difficult to prove, and there may be conflicting reports from the children, the physical examination of the children involved here and their behavioral changes as observed by their parents and trained professionals allow no other conclusion to be drawn."

In March 1988, the departmental board of review affirmed. About one week before the expiration of its license for 1987-88, Bo Peep obtained from the circuit court (Whitfill, J.) an order staying the suspension for the remainder of that license year. That order to stay incorporated the conditions of the July injunction.

Also in March 1988, the county health officer denied Deborah's application for a renewal of Bo Peep's license for the period April 1, 1988, to March 31, 1989. Bo Peep sought administrative review of that revocation. The matter was again assigned to Clark. Hearings were set to begin May 11, 1988, when, on May 2, Bo Peep's counsel wrote to Clark requesting a postponement. Bo Peep also requested that Clark

> "order the State to make available for interview those children who were involved with allegations of child abuse at Bo Peep. It is not intended that the interview would be conducted through counsel, but by a health professional of our choosing. The purpose of such interviews would be to attempt to resolve confusing and contradictory reports by others of the children's statements which have figured in past proceedings in this matter.
>
> "If we are not provided with the above information and interviews, we intend to move to exclude from

> the proceeding, on the grounds of violation of due process and fundamental fair play, the use by the State of any evidence derived from information to which we were denied access."

At the commencement of the hearing, counsel for Bo Peep pointed out that "[w]e have moved, through various letter motions, for discovery and for postponement and they're intertwined." Counsel stated, in part, that they "would like an opportunity to have people on whom we have greater confidence and faith examine the children, if there is to be new evidence here." Clark denied the discovery motion.

The hearings on the propriety of the revocation order extended over nine days, ending June 8, 1988. Introduced by the State as part of the record of the revocation proceeding were the records of the agency's suspension order hearing and of the circuit court's injunction hearing, including seven days of transcripts of the former and four days of transcripts of the latter.

While Clark had the revocation matter under advisement, the State obtained an ex parte injunction from the Circuit Court for Harford County (Baldwin, J.) barring Blevins from the Bo Peep premises. Then, in those court proceedings, Bo Peep moved on the recited authority of Maryland Rule 2-423 for an order that the allegedly abused children "undergo diagnostic examination of the genital region to evaluate visible evidence of sexual assault[.]" Bo Peep designated the director of the Rape Care Center at Greater Baltimore Medical Center as their examining physician.

Before the circuit court ruled on Bo Peep's motion, Clark filed the proposed agency decision in the revocation case. We set forth his explanation of the ultimate conclusion.

> "Regarding the issue of physical and sexual abuse of children having occurred at the Bo Peep facility,

> it is concluded that the preponderance of the testimony and evidence presented at this administrative hearing confirms the likelihood of those events, and supports the position of the Harford County Health Officer. The testimony of the the therapists and the parents is compelling, and substantiates the bases used by the Health Officer in denying relicensure. In weighing the testimony of the State's witnesses and the Appellant's witnesses, it is concluded that the evidence clearly shows that the license should not be renewed, based upon the mistreatment of children at the Bo Peep facility. A careful reading of the entire record in this case quite clearly shows that it is improbable for the events not to have occurred substantially as related by the children to their parents and to their therapists. The verbalizations, drawings, and the emotions of the children, as observed by their parents and by trained and licensed professionals, and the physical evidence as found by [two examining physicians selected by the State], have not been refuted or shown to be erroneous or misinterpreted.

The decision was adopted by the Secretary, Department of Human Resources (the Department) in August 1988, and Bo Peep appealed.

That appeal was consolidated with the earlier appeal in the suspension case. The circuit court (Baldwin, J.) stayed enforcement of the revocation order pending disposition of the administrative appeals. Judge Baldwin also refused to order medical examinations. Because neither the children nor their parents were parties to the litigation, the circuit court correctly concluded that it had no authority under Rule 2-423 to grant that requested relief.

Concerning the administrative appeals, Judge Baldwin held that the appeal from the suspension order was moot, and that holding is not challenged here. In the appeal from the revocation order the circuit court ordered a remand

to the Department for further proceedings. The court also continued the judicial stay of the Department's revocation order during the pendency of the remand.

The Department appealed the circuit court's order of remand. We granted the State's petition for a writ of certiorari prior to consideration of the appeal by the Court of Special Appeals. Bo Peep has moved to dismiss the Department's appeal. We deny that motion for reasons stated in Part I of this opinion.

The apparent purpose of the remand to the Department was to give the State an opportunity to cure what the circuit court believed to be a defect of constitutional dimension in the administrative procedure. None of the alleged victims of child abuse testified in any proceedings. Hearsay, of which the alleged victims were the declarants, was admitted through parents and others who had spoken with the children. Finding the content of the children's statements to be "foundational," the circuit court reasoned that Bo Peep's request for an interview of the children by a psychologist of Bo Peep's choice would have given the licensee "a *meaningful* opportunity to test the credibility of the out-of-hearing statements," but Bo Peep's request for such an interview was denied. Recognizing that the hearing officer had no authority to order the type of discovery requested by Bo Peep, the circuit court nevertheless concluded that under those circumstances the hearing officer "should not have considered any of the evidence which was dependent on the foundational out-of-hearing statements where circumstances prevented an opportunity to challenge." We discuss this issue in Part II, *infra*.

The circuit court also found that the hearing officer had erred in restricting the scope of cross-examination by Bo Peep of a police officer who had participated in the investigation of suspected child abuse. We address that question in Part III hereof.

Bo Peep argued, and the circuit court found, that the licensing agency had violated its own regulations by failing to reinspect the premises of the child care center prior to revocation. Bo Peep also sought, but failed, to persuade the circuit court that Clark should have recused himself from conducting the revocation hearing. Parts IV and V, below, respectively deal with those arguments advanced here by Bo Peep as additional support for the circuit court's result.

Bo Peep does not argue that there was a lack of substantial evidence before the agency to support its findings of physical and sexual child abuse at Bo Peep. Consequently, we need not review the evidence in detail. In Part II we shall review the evidence only to the extent needed to illustrate Bo Peep's due process contention.

I

Bo Peep, relying the *McKinney-Peco* doctrine, has moved to dismiss the Department's appeal. *See Zoning Appeals Bd. v. McKinney*, 174 Md. 551, 199 A. 540 (1938) and *Maryland Pharmacy Bd. v. Peco, Inc.*, 234 Md. 200, 198 A.2d 273 (1964). In a line of cases beginning with *McKinney*, "this Court has taken the position that certain administrative agencies acting in a 'quasi-judicial' capacity cannot appeal the reversal of their decisions by a circuit court, unless the authority to appeal is specifically provided by statute." *Consumer Protection Div., Office of the Attorney Gen. v. Consumer Publishing Co.*, 304 Md. 731, 742, 501 A.2d 48, 54 (1985). In *Consumer Protection*, Judge Eldridge, writing for the Court, analyzed the *McKinney-Peco* line of cases and pointed out that the doctrine does not apply to all agencies. It does not apply to agencies whose functions " 'are so identified with the execution of some definite public policy that their participation in litigation affecting their decisions is regarded by the Legislature as essential to the adequate protection of the State's interests.' " *Consumer Protection*, 304 Md. at 743, 501

A.2d at 54 (quoting *McKinney*, 174 Md. at 561, 199 A. at 545).

In *Consumer Protection* we concluded that that Division in the Attorney General's Office was not the kind of non-adversarial, quasi-judicial agency contemplated by the doctrine. The Division's statutory powers included the power to receive and investigate complaints, to initiate investigations, to issue cease and desist orders, to adopt rules and regulations and to seek injunctions. We held that "[w]ith its many different functions, its mandate to protect consumers and its role as a representative of the interests of the State, the Division is not the type of agency to which the rationale of *McKinney* applies." 304 Md. at 746, 501 A.2d at 56.

The reasoning of *Consumer Protection* applies with equal force here to permit the Department to pursue its strong interest in the outcome of this case which it initiated and vigorously prosecuted by appealing the reversal of its order. The statutory regulation of child care centers in Family Law Article, Title V, "Children," Subtitle 5, "Child Care; Foster Care," contains legislative findings and statements of purpose in § 5-571. These include a finding that "if care of a child is given over to another, mental and physical risks arise that need to be offset by reasonable protective measures." § 5-571(a)(1)(ii). The purpose of the child care subtitle

> "is to aid each parent and protect each child from the risk present if:
>
> "(1) the child is cared for by an individual other than a relative or friend; and
>
> "(2) children of more than one family are cared for together. . . ."

§ 5-571(b). Pursuant to those findings and purposes the Secretary of the Department is given authority to adopt rules and regulations which shall ensure, *inter alia*,

"proper care, protection, and supervision of children in child care centers[.]" § 5-573(b)(2). The Department is authorized to issue, deny, suspend and revoke licenses for child care centers. §§ 5-574 through 5-580. The Secretary of the Department, or the Secretary's designee, is authorized to petition a circuit court to enjoin unlicensed child care center operations. § 5-508(e). Child care centers must be open to inspection by, *inter alia*, representatives of the Department. COMAR 10.05.01.80 (1988).

All cases of suspected child abuse are reported to a local department of the Social Services Administration. *See* Family Law Article, §§ 5-704 through 5-706. The Social Services Administration is a division of the Department. § 5-501(b). Each local department is required to notify the designee of the Secretary of the Department within forty-eight hours after the local department's receipt of a report of suspected child abuse. The Secretary's designee then convenes a multi-disciplinary team, which the Secretary's designee chairs, to coordinate procedures to be followed in investigating and otherwise responding to the report. § 5-584.

Thus, the role of the Department in cases of suspected child abuse, particularly at a child care center, is not a passive one of quasi-judicial adjudication, but is an active role of policy formulation and protection of children.

The Department may appeal the circuit court's order.

II

The next issue is whether the procedure which resulted in the revocation of Bo Peep's child care center license violated due process because the procedure did not include a method for, and Bo Peep was not allowed to conduct, a psychological examination by an expert of its choice of the allegedly victimized children. In this Part II we shall (A) explain the general evidentiary framework of the case; (B) illustrate the due process problem by reviewing the

evidence relating to a specific child; and (C) analyze and decide the constitutional issue.

A

The due process issue arises out of the largely circumstantial way in which the Department proved child abuse at Bo Peep. In general that proof fell into four categories: (1) testimony by physicians stating their observations when physically examining children and expressing their medical opinions based upon those observations; (2) testimony of parents, social workers and psychologists narrating their observations of relevant nonassertive verbal and nonverbal conduct of the children; (3) statements of history to treating clinicians; and (4) testimony from parents, social workers or other adults relating other assertive statements of the children, that is, statements relevant only for the truth of the content of the statements.

Medical members of the interdisciplinary team or teams assembled to evaluate possible sexual child abuse at Bo Peep were Drs. Charles Schubin and Michael Reichel. Dr. Schubin is an assistant professor of pediatrics at the University of Maryland Hospital who has examined between 2,000 and 3,000 children for evidence of sexual abuse. Dr. Reichel is assistant chairman of the Department of Pediatrics at Greater Baltimore Medical Center and has consulted in over 200 hundred cases of various forms of abuse of children. They collectively examined nineteen children who had attended Bo Peep during the summer of 1987 and concluded that eight, of whom seven were females, exhibited physical conditions consistent with sexual abuse. These conditions principally were gross enlargement of the hymen, vaginal scars and tears, and anal gaping and scarring. Each of the doctors testified in person and was subjected to cross-examination.

The relevance of the nonassertive verbal and nonverbal conduct of the children lies in certain behavior which is

indicative of sexual abuse. Hearing Officer Clark explained the relevance and reliability of this class of evidence, saying:

> "Certain behavioral changes exhibited by young children are indicative that trauma has occurred to them, and certain behaviors are unlikely to be exhibited as a result of any trauma other than sexual abuse. Visible trauma to the sexual organs of children is indicative of sexual abuse; so is inappropriate sexual behavior with peers, toys, or animals; so is verbalizing sexual language or knowledge that is atypical for that child's age. As the number of those physical confirmations rise in a particular day care center population, the concern is heightened that such abuse has in fact occurred there. An example of behavioral indications that sexual abuse has occurred to her, is when a young child, three or four years old, becomes very sexually provocative, or has a marked change in her sexual activities. Other behavioral changes brought about in children who have been sexually abused include regression, i.e. toilet trained children begin to wet or soil themselves; loss of appetite; breaking out in rashes; crying; constipation; sleep disturbances; phobias or avoidance behavior; withdrawal or depression; aggressive behavior; excessive masturbation; hysterical reactions; perpetration of sexually unacceptable conduct upon others; genital or urethral trauma; genital infections; recurrent urinary tract infections; abdominal pain; and other manifestations."

The hearing officer's view of the probative value of that evidence is supported in the literature. *See* Finkelhor, Williams, Burns & Kalinowski, *Sexual Abuse in Day Care: A National Study*, Family Research Laboratory, U. of New Hampshire at 7-8 (1988); Berkowitz, *Sexual Abuse of Children and Adolescents*, 34 Adv. Pediatr. 275, 278-79 (1987); Herbert, *Expert Medical Assessment in Determining Prob-*

ability of Alleged Child Sexual Abuse, 11 Child Abuse & Neglect 213, 216-17 (1987); Wherspann, Steinhauer & Klajner-Diamond, *Criteria and Methodology for Assessing Credibility of Sexual Abuse Allegation*, 32 Can. J. Psychiatry 615, 622 (1987); Paul, *"What Really Did Happen to Baby Jane"—The Medical Aspects of the Investigation of Alleged Sexual Abuse of Children*, 26 Med. Sci. Law 85, 96-102 (1986); Krugman, *Recognition of Sexual Abuse in Children*, 8 Pediatr. in Review 199, 202-04 (1986); de Young, *A Conceptual Model for Judging the Truthfulness of a Young Child's Allegation of Sexual Abuse*, 56 Amer. J. Orthopsychiat. 550, 555-56 (1986); Hunter, Kilstrom & Loda, *Sexually Abused Children: Identifying Masked Presentations in a Medical Setting*, 9 Child Abuse & Neglect 17, 19 (1985).

The adults who testified to the relevant, nonassertive verbal and nonverbal conduct of the children did so in person and were subject to cross-examination. Testimony of the type described in this second category of proof would have been admissible in a judicial proceeding. *See In re Dependency of Penelope B*, 104 Wash.2d 643, 709 P.2d 1185 (1985) (en banc).

The third class of proof concerns a clinical psychologist, as to two children from Bo Peep whom she was treating, and a clinical social worker, as to three children from Bo Peep whom she was treating.[2] They opined that the children had been sexually abused at Bo Peep. These opinions were based on personal observations of, and parental reports of, conduct of the type described above, as well as on statements made to the experts by the children in therapy sessions. Both of these experts were subject to cross-examination.

The testimony of these witnesses was sufficiently reliable to be admissible in this administrative proceeding,

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[2] As to treatment by clinical social workers see COMAR 10.42.02 and 73 Op. Att'y Gen. (Md.) 319 (1988) [Opinion No. 88-049 (Nov. 9, 1988)].

whether or not some or all of the hearsay declarations of the children embodied within that testimony would have been admissible in a judicial proceeding. Under the law of evidence, as a general proposition, statements of medical history, made by a patient to a treating medical practitioner for the purpose of treatment, may be admitted as substantive evidence through the medical witness. If the medical practitioner is engaged only to render an expert opinion, and not for purposes of treatment, statements of history related by the patient are admissible through that witness for the limited purpose of explaining the basis for the expert's opinion. *See State v. Allewalt*, 308 Md. 89, 517 A.2d 741 (1986); *Beahm v. Shortall*, 279 Md. 321, 368 A.2d 1005 (1977). From the standpoint of reliability, hearsay of the subject type has been recognized as evidence by the United States Court of Appeals for the Fourth Circuit. Applying Fed.R.Evid. 803(4), that court held that statements describing abuse, made by a four year old child to her psychologist for purposes of treatment, are admissible as substantive evidence. *Morgan v. Foretich*, 846 F.2d 941 (4th Cir. 1988). And *see United States v. Renville*, 779 F.2d 430 (8th Cir.1985).[3]

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[3] The instant matter is substantially distinguishable from *Bohnert v. State*, 312 Md. 266, 539 A.2d 657 (1988) where we excluded a purportedly expert opinion that a child, age seven (Joint Record Extract, Vol. 1, at 91-96), had in fact been sexually abused. That criminal prosecution involved application of the rules of evidence. The expert was a protective service investigator with the Social Services Administration who had investigated the complaint, *id.* at 219, 539 A.2d 657, whereas the witnesses in the matter before us were treating clinicians. With respect to underlying reliability, we held that there was an insufficient basis for any opinion by the witness in *Bohnert* who had not subjected the child to any type of objective tests, who had found no need to review medical reports, who did not compare the child's behavior to general behavioral characteristics of child abuse victims and who relied, at least in part, on " 'a certain sense about children[.]' " *Bohnert*, 312 Md. at 272, 539 A.2d at 660. Under the circumstances in *Bohnert* we also concluded that the opinion was no more than the witness's conclusion that the child, as opposed to Bohnert, was telling the truth.

In the fourth class of evidence in the Department's case, adults related assertive statements made by children, not for purposes of medical treatment, in which the children described, in their terms, acts of physical and sexual abuse said to have been committed on them at Bo Peep. From the standpoint of comparison to a judicial proceeding particular statements may or may not have qualified as admissible hearsay under the excited utterance exception. *Compare United States v. Iron Shell*, 633 F.2d 77 (8th Cir.1980), *cert denied*, 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981); *United States v. Nick*, 604 F.2d 1199 (9th Cir.1979); *Moore v. State*, 26 Md.App. 556, 338 A.2d 344, *cert. denied*, 276 Md. 747 (1975) (exception applied) *with Cassidy v. State*, 74 Md.App.1, 536 A.2d 666, *cert. denied*, 312 Md. 602, 541 A.2d 965 (1988) (exception inapplicable).

Deborah testified in Bo Peep's case. The thrust of her evidence was that Bo Peep was so closely supervised and so open to parents at all times that any abuse suffered by any children who happened to be enrolled there could not have occurred on the Bo Peep premises. A psychologist testified on behalf of Bo Peep from a review of medical records and transcripts of prior testimony, but without having examined the children. That expert opined, in essence, that the apparent abuse of particular children was explainable by masturbation, constipation, and/or separation anxiety, coupled with a strong suggestion of an overlay on the entire case of some hysteria on the part of some adults.

The hearing officer was persuaded that there was child abuse and that it had occurred at Bo Peep. Essentially Clark concluded that coincidence could not explain the number of children who bore physical findings consistent with sexual abuse, who manifested behavior indicative of having been sexually abused, and who were said to have described acts of physical and sexual abuse at Bo Peep.

B

To illustrate the due process issue in a factually specific context, we shall review the evidence concerning child 7.[4] Bo Peep argues that "[t]he statements of child 7 are a prime example of the effect of the due process denial upon Bo Peep." Appellee's Brief at 27.

Child 7 is a female who was three and one-half years old in July 1987. Because the child had exhibited several symptoms of abuse, as listed in a brochure which the child's parents had obtained at a meeting sponsored by the Social Services Administration, the parents caused child 7 to be examined by Dr. Schubin on July 2, 1987. On that examination the diameter of the child's hymen was two millimeters, a finding which was normal for her age. Child 7 did not thereafter attend Bo Peep until Monday, July 13. In the interim child 7 was constantly with her parents during the family vacation.

On Wednesday, July 15, the mother picked up child 7 at Bo Peep after 4:00 p.m. The child complained that her bottom hurt. The complaints continued into the evening. When bathing child 7 that evening the mother notice a small cut near the child's vaginal area. On questioning the child told the mother that that was where Miss Debbie had put toilet paper in her. As a result the parents caused child 7 to be reexamined by Dr. Schubin on Friday, July 17 at noon. Dr. Schbin testified that on that examination the hymenal opening was then "grossly distorted" to ten by fifteen millimeters, with swelling and redness, in terms of a clock face, from two to six. In his opinion the injuries occurred within four to six days prior to his examination. In his opinion the child could not physically have produced the injury with her own hands by masturbating.

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[4] Numbers were used at trial and in the appellate briefs to identify particular children, in lieu of names.

Child 7's mother testified that child 7 said on Friday that Mr. Pat was also there when Miss Debbie put toilet paper in her. On Saturday the child told the mother that "Miss Rita" (*i.e.*, Blevins) and "Miss Martha" were also there and that "a ball" had been put in her. At first she described the ball as orange and then as pink. She said this happened when she was in the kitchen on the table.

In September 1987 child 7 began to be treated by Mary Derbyshire (Derbyshire), a clinical social worker. Derbyshire was also treating two other children from Bo Peep whom she believed had been abused. Derbyshire testified for two full days in the revocation case. Her direct and cross-examinations, and related colloquy, are reported in approximately 575 pages of transcript. The notes which she made of sessions with the children were introduced in evidence and made available to Bo Peep's counsel overnight for preparation for cross-examination. Drawings made by the children in the therapy sessions were introduced as exhibits. Child 7 was still in weekly therapy with Derbyshire when the latter testified in May 1988.

Derbyshire acknowledged that, particularly in the early phases of the treatment, the child "had confused thoughts that interfered with her being able to verbally articulate things in a way that she was experiencing them. . . ." In September the child talked of Bo Peep as a bad place where Miss Rita had hurt the child's "operation." Child 7 had had a hernia operation resulting in a scar in her pelvic area. During a November session child 7 said that Miss Rita had beaten her "down there" (pointing to the vaginal area) when the child was going potty. When asked to demonstrate the child used both of her fists and started beating on her pelvic area. Derbyshire then asked the parents to join them and the child repeated the demonstration again. After each demonstration the child stated that she was just kidding. Derbyshire's interpretation of the statement, "just kidding," was that child 7 had difficulty ac-

cepting the reality of what had happened and that was her way of making the occurrence not real.

Child 7 refused to take naps. When Derbyshire was attempting to treat that fear, the child told Derbyshire that "Mr. Pat [had] sat next to her when she was asleep and he had newspapers . . . and he put the newspapers on her and then he tried to choke her. . . ." The child demonstrated by putting her hands around her neck. When child 7 talked about Miss Rita hurting the child's "operation," the child would tremble, shake, cry, and beg to go home. The child said that Miss Rita would beat her in the belly and demonstrated by placing the palm of one hand flat against her stomach and striking the back of that hand with her other hand in a fist. Derbyshire understood that to be a technique for beating a child without leaving a bruise.

The child also referred to Blevins as "big foot" and spoke of a "water machine" used to spray the children with colored water in a kitchen at Bo Peep. The specific testimony on these points is set forth in the margin.[5] Der-

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[5] Describing a January 1988 session Derbyshire said that the child

> "didn't like to come to the sessions because it made her think about things that were scary and I asked her what kind of things and she said Bo Peep, she was sobbing, she was shaking, she was wringing her hands, at times she was masturbating, she said she was afraid of big foot, that she thinks about Miss Rita pinching her in the bathroom and that Miss Rita was pinching her in the bathroom Mr. Pat and Miss Rita were there and that it was dark, she said that when they did that it hurt her on her belly and her operation and then she said there was a water machine in the attic and that the water machine was taken to the kitchen table and the kids were put on the kitchen table by Miss Rita and Mr. Pat, the kids had clothes off but Miss Rita and Mr. Pat had clothes on, the kids bodies were squirted with colored water, sometimes hot water, sometimes cold, all over their bodies including down there, sometimes the water was yellow, gold, pink or clear. And then she said sometimes Mr. Pat would hide in the

byshire testified that the child said that Miss Rita had told child 7 that if she ever told secrets she would be taken away on a bus. The child had a fear that if she took a field trip by bus with the children at her new nursery school she would never be brought home again.

Bo Peep's expert, Dr. Lawrence Donner (Donner), is a clinical psychologist. Donner testified for two full days in the revocation case. His direct and cross-examinations, and related colloquy, occupy approximately 455 pages of the transcript. His view was that child 7's "just kidding" remarks refer to the fact that it was a game which Derbyshire was asking child 7 to play. Donner also concluded from the different actors and situations included in the pattern of detail involved in child 7's descriptions that "there's no consistency in what she says. There's clearly no basis in terms of my opinion in reality in what she's saying."

C

When the circuit court expressed its concern over the introduction into the agency hearing record of out-of-hear-

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dark bathroom when Miss Debbie was coming and then she said sometimes Mr. Pat went to the basement to get rope or was going to get the water machine. . . ."

Speaking generally of the two months preceding her testimony in May of 1988, Derbyshire said that

> "periodically this fear of big foot would be verbalized. At this particular point in time the child was able to, in a coherent fashion provide some more information in terms of the fear of big foot, what she said was that big foot used to get us in the kitchen with the tables. What that means is apparently there's more than one kitchen at Bo Peep and child number seven refers to one of these kitchens as a kitchen with a table and she said that big foot is Miss Rita and that Mr. Pat gave Miss Rita a big foot outfit when he dressed up as Santa at a bad Christmas party at Bo Peep. Miss Rita used to be big foot and scare us. Once again she describes Miss Rita hitting, quote, 'us like this', and describes the flat palm on her belly and then the fist beating the palm on her belly."

ing statements by the children concerning "foundational" matters, the court was simply referring to hearsay concerning material facts. Hearsay which is inadmissible in a judicial proceeding is not per se inadmissible in an administrative proceeding. *See Fairchild Hiller Corp. v. Supervisor of Assessments for Washington County*, 267 Md. 519, 298 A.2d 148 (1973); *Tauber v. County Bd. of Appeals for Montgomery County*, 257 Md. 202, 262 A.2d 513 (1970); *Eger v. Stone*, 253 Md. 533, 253 A.2d 372 (1969); *Neuman v. Baltimore*, 251 Md. 92, 246 A.2d 583 (1968). Under the Maryland Administrative Procedure Act, applicable here, "[t]he agency may admit probative evidence that reasonable and prudent individuals commonly accept in the conduct of their affairs and give probative effect to that evidence." Md.Code (1984), § 10-208(b) of the State Government Article.

To accept Bo Peep's argument the circuit court's analysis had to escalate to the constitutional level. But procedural due process does not prevent an agency from supporting its decision *wholly* by hearsay, if there is underlying reliability and probative value. *See Richardson v. Perales*, 402 U.S. 389, 402, 91 S.Ct. 1420, 1428, 28 L.Ed.2d 842, 853 (1971) (in a federal social security disability hearing, "a written report by a licensed physician who has examined the claimant and who sets forth in his report his medical findings in his area of competence may be received as evidence . . . and, despite its hearsay character and an absence of cross-examination, and despite the presence of opposing direct medical testimony and testimony by the claimant himself, may constitute substantial evidence supportive of a finding by the hearing examiner adverse to the claimant, when the claimant has not exercised his right to subpoena the reporting physician. . . .").[6]

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[6] The State has argued that Bo Peep could have subpoenaed and examined the children whom the State alleged were abused. Bo Peep,

"Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 162, 71 S.Ct. 624, 643, 95 L.Ed. 817, 849 (1951) (Frankfurter, J., concurring). Currently the United States Supreme Court utilizes a balancing analysis in deciding questions of procedural due process. It was described for the Court by Justice Powell in a case involving termination of social security benefits, *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

> "More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Id. at 335, 96 S.Ct. at 903, 47 L.Ed.2d at 33.

We have neither been cited to, nor found, any decision involving administrative proceedings in which the contention was made that procedural due process required a prehearing examination of a nonparty by a health care professional. A straightforward application of the princi-

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on the other hand, asserts that it sought a psychological examination in lieu of subpoenas and of interrogation by counsel at the hearing. We will not rest our decision on this argument advanced by the State. To do so would imply that, had subpoenas for the children been sought and opposed by motion to quash, the hearing officer should have refused to quash in order to protect a due process right. That is not the issue before us and we intimate no opinion thereon.

ples quoted above from *Mathews v. Eldridge* demonstrates that due process has not been violated here.

2 R. Rotunda, J. Nowak & N. Young, *Treatise on Constitutional Law, Substance and Procedure* § 17.8, at 250 (1986) places in constitutional context the problem now before us.

> "Before examining the balancing test in operation, one should note the different elements of the adversary process which may be required as part of the 'due process' which must be afforded to an individual when the government deprives him of life, liberty or property. The essential elements are: (1) adequate notice of the charges or basis for government action; (2) a neutral decision-maker; (3) an opportunity to make an oral presentation to the decision-maker; (4) an opportunity to present evidence or witnesses to the decision-maker; (5) a chance to confront and cross-examine witnesses or evidence to be used against the individual; (6) the right to have an attorney present the individual's case to the decision-maker; (7) a decision based on the record with a statement of reasons for the decision."

(Footnote omitted). The authors list six additional procedural safeguards, including "a right to pre-trial discovery of evidence," which the authors state "tend to appear only in connection with criminal trials or formal judicial process of some type." *Id.*

The private interest to be affected by the license revocation is Deborah's continued operation of a day care center business on the premises. No liberty interest is at stake. *Cf. Coy v. Iowa*, ___ U.S. ___, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988); *Craig v. State*, 316 Md. 551, 560 A.2d 1120 (1989); *Wildermuth v. State*, 310 Md. 496, 530 A.2d 275 (1987) (accused's right of confrontation in criminal prosecution). The Cassillys' property interests in the realty and equipment are not at stake. Where, as here, the li-

cense to engage in a regulated business may not be withdrawn at the discretion of the licensing authority but only upon proof of certain contingencies, the procedure by which a state undertakes to suspend or revoke the license is restrained by due process. *See Barry v. Barchi*, 443 U.S. 55, 64 n.11, 99 S.Ct. 2642, 2649 n. 11, 61 L.Ed.2d 365, 375 n. 11 (1979). That case involved the suspension, prior to any hearing, of the license of a horse trainer pursuant to a state regulation which presumed negligence on the part of a trainer whose horse tested positive for drugs after a race. The Court held that the interest of the state in the integrity of racing justified the procedure, so long as a post-suspension hearing was promptly held. The regulation in *Barry v. Barchi* was invalid because it set no time limit within which the post-suspension hearing had to be held, and it allowed the agency thirty days after the hearing within which to decide the issue.

The procedures actually used by the Department greatly minimized the risk of an erroneous deprivation of Deborah's license. There were two protracted hearings before the agency at each of which Bo Peep was afforded all of the protections which will ordinarily satisfy due process requirements in contested administrative law cases. *See* Rotunda, *supra*; Friendly, *"Some Kind of Hearing,"* 123 U.Pa.L.Rev. 1267 (1975). The record of a judicial proceeding in a circuit court was also made part of the agency record. The Department's decision was based on uncontradicted physical findings, on personal knowledge of adults concerning relevant, nonassertive conduct, on expert opinions based in part on psychologically pertinent history and, only to a degree, on hearsay declarations which would have been inadmissible as substantive evidence in a judicial proceeding. We cannot quantify the degree of the latter. In the case as a whole, however, Bo Peep does not contend that that hearsay was both so unreliable and so pervasive as to undermine the substantiality of the evidence against it.

Rogers v. Radio Shack, 271 Md. 126, 314 A.2d 113 (1974) on which Bo Peep relies was based on a procedural deficit of a kind not present in the instant case. In that unemployment compensation case the agency record included, and presumably the agency considered, an investigator's report which had never been introduced into evidence at any hearing and of which the claimant was unaware. Under those circumstances, where the claimant had "no opportunity for cross-examination or rebuttal," we held that "fundamental fairness would preclude reliance upon the report by an administrative agency or a reviewing court." *Id.* at 129, 314 A.2d at 115.

The next factor to be weighed, per *Mathews v. Eldridge*, is "the probable value, if any, of additional or substitute procedural safeguards." 424 U.S. at 335, 96 S.Ct. at 903. Here that value is minimal. Bo Peep asserts that the circuit court was correct in holding that "due process of law requires that the opponent have a *meaningful opportunity* to test the credibility of out-of-hearing statements if the agency decision is foundationally based on such statements, whether or not the statements constitute hearsay." Appellee's Brief at 9-10. We observe that, strictly speaking, statements do not have credibility—witnesses do (or do not). Seemingly contradictorily, Bo Peep then submits that "the truth of the children's statements is not at the heart of the issue; the children never testified. It is the *meaning* of these statements which went untested." *Id.* at 10. Bo Peep complains that certain "persons drew conclusions from the statements made to them by the children" but that Bo Peep "was denied the right to reach behind the State's conclusions by testing the credibility of the process, thereby testing the meaning of the children's statements." *Id.*

This argument can embrace at least four possible defects affecting the "credibility of the statements." First, the content of the declarant's statement may be false. Secondly, an adult witness, either intentionally or uninten-

tionally, may have inaccurately conveyed the declarant's statement to the decision maker. Third, the adult witness may have drawn an erroneous conclusion from the declarant's accurately reported statement. Fourth, the adult witness may have accurately communicated the declarant's statement, as far as it goes, but may have omitted other matter never explored, or deemed by the witness to be insignificant, but which would be significant to some other evaluator.

The first possibility is that some or all of the children are lying. The authors of the article, "*Assessing the Credibility of Young Children's Allegations of Sexual Abuse: Clinical Issues,*" *supra*, discuss the situations commonly associated with false allegations.

> "Young children almost never initiate false allegations without influence from an adult. Commonly an adult, either unconsciously or consciously, is intent on proving to themselves or others that the allegations of abuse are true. The child is thus influenced by the adult to present with a false allegation. Four factors of adult influence, either individually or in combination, are most often present in fictitious stories. The mere presence of any of these factors does not mean that an allegation is false. However, in untrue stories, positive evidence linking one or more of these factors to the accusation exists. The factors of influence are:
>
> "1. The presence of the post traumatic stress disorder in the adult.
>
> "2. The presence of serious psychiatric disorder in a parent and evidence of a symbiotically disturbed mother-child relationship.
>
> "3. The existence of an ongoing custody/access dispute.

"4. A professional committed prematurely to the truth of the allegation."

32 Can. J. Psychology at 611. In the instant matter Bo Peep either cross-examined or had the opportunity to cross-examine or subpoena any adult who may have influenced any child falsely to describe an occurrence at Bo Peep.

Similarly, as to the second and third possibilities, those who testified concerning statements made by the children were subject to cross-examination concerning the accuracy of their communication. The validity of the conclusions drawn by the Department's witnesses from statements made by the children were questioned by Bo Peep's expert in psychology, Donner, who offered other explanations exculpatory of Bo Beep. Necessarily, Bo Peep was sufficiently informed of the surrounding circumstances to enable Donner to present that rebuttal.

Finally, although there was undoubtedly some risk that an adult witness might not have explored or communicated some facet of a child's life which Bo Peep's expert would consider relevant, Bo Peep had the opportunity, by cross-examination of the adult witnesses, to explore omissions by them, and Bo Peep had the opportunity to argue that omissions had invalidated the witnesses' conclusions. In sum, it appears that Bo Peep's desire to test the "credibility of statements" is a desire to discover additional data which could be used by its expert to support conclusions favorable to Bo Peep and thereby perhaps enhance the possibility that the decision maker would accept those favorable opinions. In this case that possibility is slight because of the number of children at Bo Peep who bear physical signs consistent with their having been sexually abused.

Finally, under *Mathews v. Eldridge*, we consider "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424

U.S. at 335. Here we must weigh heavily in favor of the State its interest in licensing only day care centers where children are properly cared for and, more particularly, the State's great interest in protecting children from physical and sexual abuse. Further, the State has an interest in protecting the children from further anxiety, even if there would be less emotional trauma in a psychological interview than in a cross-examination. That interest is so clear that it in part underlies Bo Peep's decision not to attempt to require the children to testify in person at the hearing. Also weighing heavily against Bo Peep's request for implementation of an additional procedure is that the requested procedure was not within the power of the hearing officer. A court adjudicating a property interest in a civil matter has no authority to compel a pretrial psychological examination of a non-party witness, and we would be ill advised to create that right in administrative proceedings by a fiat on constitutional grounds.

For all of the foregoing reasons Hearing Officer Clark did not deprive Bo Peep of due process of law in denying Bo Peep's motion for a prehearing psychological interview of the allegedly abused Bo Peep enrollees.[7]

III

The circuit court also held that the hearing officer had erred, in the suspension hearings of August 1987, by restricting the scope of cross-examination of Sergeant Joseph Swam (Swam), a witness called by the licensing agency. As a member of the Bel Air Police Department, Swam had been involved in the investigation of allegations of

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[7] Bo Peep predicates its due process argument on Maryland Declaration of Rights, art. 24, in addition to the Fourteenth Amendment to the Constitution of the United States. The two provisions are *in pari materia*. *See Lodowski v. State*, 307 Md. 233, 248, 513 A.2d 299, 307, *cert. denied*, 475 U.S. 1086, 106 S.Ct. 1469, 89 L.Ed.2d 725 (1986); *Sites v. State*, 300 Md. 702, 717, 481 A.2d 192, 199 (1984).

child abuse at Bo Peep since June 1987.[8] After eliciting Swam's background, his experience in conducting investigations and his view that, in multiple victim crimes, the investigator frequently looks for a common denominator, Swam testified that he had not identified up to that time any common denominator of the alleged victims other than Bo Peep.

Counsel for the agency then had Swam relate a conversation with Deborah in which she referred to adult members of the families of two of the alleged victims. Deborah said that the alleged victims were apprehensive, respectively, toward those adults. The information was intended to suggest that the adult family members were suspects. Objections by counsel for Bo Peep cut off Swam's describing how he followed up on this information. The agency proffered that it wished to show that the investigation was thorough, that the two adults consented to take polygraph examinations, which they passed, and that the police consequently excluded them as suspects. The hearing officer sustained Bo Peep's objection concerning the result of polygraph examinations. The agency was able to prove only that the police generally use polygraph examinations as an investigative tool and that they used that tool in the investigation in the instant matter.

On cross-examination counsel for Bo Peep asked, "What people have you contacted in the course of your investigation of Bo Peep?" Swam balked at answering. He claimed that he appeared as a witness with the understanding that there would be significant limitations on the scope of the questions which he would be asked. Counsel for the agency explained that Swam did not believe he could reveal details of an on-going criminal investigation.

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[8] Swam testified, without contradiction, that he did not interview any of the children. Thus the issue before us concerning Swam's cross-examination is not involved in the due process issue discussed in Part II, *supra*.

Hearing Examiner Clark referred to the confidentiality provisions of the "Public Information Act." He ruled that Bo Peep should "question this witness on the basis of the questions and answers that were given on direct examination." Counsel for Bo Peep asked if Swam had interviewed all of the employees at Bo Peep, to which Swam explained that every interview of a potential witness or suspect generates a report which becomes part of a criminal investigation file. The hearing officer again instructed Bo Peep's counsel to confine the questions to testimony brought out on direct examination. Counsel asked if Swam had interviewed all of the parents. An objection was sustained.

Swam's testimony that Bo Peep was the common denominator among the children is recited in Clark's opinion in the suspension case.

To the extent, if any, that Clark unduly precluded Bo Peep from testing Swam's common denominator conclusion, the assumed error is not prejudicial. When Swam had been asked whether there was any place that the children had in common, counsel for Bo Peep objected on the ground that the question was "really ridiculous." That counsel observed that "[o]bviously he's going to say Bo-Peep," inasmuch as the universe of allegedly abused children was limited to those enrolled at Bo Peep. The hearing officer did not need Swam's opinion on investigations in order to make the common denominator fact-finding.

To the extent that Bo Peep sought to use Swam to "fish" for additional suspects, the issue is whether Clark abused his discretion in closely limiting the scope of cross-examination. *See Commission on Medical Discipline v. Stillman*, 291 Md. 390, 435 A.2d 747 (1981) (administrative agency may limit the scope of cross-examination and that decision will not be disturbed unless there has been an abuse of discretion). Bo Peep by its objections had prevented evidence of the police follow up on the "suspects"

identified by Deborah. Clark was not obliged to let Bo Peep explore through Swam whether one or more other persons had, at one time or another, been the object of police attention when the matter would be left hanging, open ended, with only half of the story told. Clark had already ruled, at Bo Peep's request, that the results of polygraph tests could not be referred to as the basis for eliminating persons from suspicion. We see no abuse of discretion.

In any event, Bo Peep never proffered what its objective was in pursuing the line of interrogation of Swam. Even if Bo Peep's cross-examination had a proper objective, other than to weaken the common denominator conclusion, we have no basis from the record to conclude that the error was prejudicial in the revocation case now before us.

IV

In this part we address Bo Peep's argument that, because the State did not reinspect the Bo Peep premises as required by the regulation dealing with license renewal, the State could not revoke the license based on violations of regulations requiring adequate supervision and prohibiting injurious treatment. We shall assume, *arguendo*, that there was no reinspection.[9]

Three days after the Board of Review of the Department of Health and Mental Hygiene had affirmed the license suspension, the Harford County Health Officer, by letter of March 26, 1988, denied Deborah's then pending appli-

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[9] Bo Peep relies on the testimony of a Child Development Specialist for the Harford County Health Department who was told by her supervisor not to make a reinspection at Bo Peep in connection with the application for license renewal. The State does not concede a failure to reinspect. It argues that tours of the facility and reviews of documentation by state and local licensing representatives satisfy the reinspection requirement, if applicable.

cation for renewal of the Bo Peep license. The reasons given for the decision were, in substance:

> 1. Continued operation of Bo Peep was not consistent with the objectives of certain statutes requiring proper care, protection and supervision of children;
>
> 2. Certain regulations, not involving child abuse, had been found in the suspension case to have been violated;
>
> 3. There was a lack of adequate protection and supervision; and
>
> 4. There had been repeated instances, as found by the hearing officer, in which children were subjected to injurious treatment in violation of COMAR 10.05.01.46."

COMAR 10.05.01.46 (1988) provides:

> "A child may not be subjected to treatment injurious to his physical or emotional health by a staff member or any individual connected with the center such as a substitute, volunteer, or person living in a household in which a center is licensed."

The health officer acted under the recited authority of COMAR 10.05.01.10 (1988). Subparagraph B of that regulation provides:

> "B. For serious or repeated violations of any of the requirements of these regulations . . . a license may be permanently revoked after an opportunity for a hearing has been provided by the Secretary. Before this action, the Secretary or the local health officer shall notify the licensee in writing, setting out the reasons for the action and advising the licensee that his license shall be permanently revoked at the end of 5 days following service of the notice, unless the licensee files with the Secretary a written request for a hearing within the 5-day period."

Bo Peep relies on COMAR 10.05.01.07 (1984), "Conditions and Limitations of License," which in part states that "[t]he renewal procedure for a license shall include a reinspection and re-evaluation of the center by the local health officer and appropriate authorities. . . ." Because the revocation of Bo Peep's license procedurally was initiated by a refusal to renew, Bo Peep argues that 10.05.01.07 is applicable and further reads the reinspection requirement as a condition precedent to revocation.

The State argued to the circuit court that 10.05.01.07 did not circumscribe the Department's authority to revoke where the grounds were inadequate supervision and injurious treatment. The circuit court, however, in view of its finding of a due process violation, ordered that the further proceedings on remand include reinspection.

We have held that the agency hearing did not violate due process so that the issue before us is purely one of interpretation of the regulations. The primary purpose of the regulation requiring reinspection is to protect children, by insuring that requirements determinable on inspection had been met. By way of illustration, these requirements would seem to include the nature and condition of the physical plant and of the equipment, including food service capacity, and required record keeping. The reinspection requirement may well additionally operate as a protection to a licensee against a refusal to renew on a ground which reinspection would reveal does not exist. But none of those purposes has any relationship to the grounds relied upon by the Department for the revocation or nonrenewal of Bo Peep's license. It was not the intent of the reinspection regulation that an inspector must observe child abuse on a reinspection before a license can be revoked by nonrenewal based on child abuse demonstrated circumstantially.

V

Bo Peep's final assertion is that the hearing officer, Clark, should have recused himself in the revocation case.

The circuit court held that Clark had not abused his discretion by deciding to proceed. Bo Peep's point is that Clark, on the first day of the revocation hearings, had admitted into the record the transcript of the suspension case and a copy of his findings and conclusions as hearing officer in the suspension case. Bo Peep argues that, because all of the violations alleged in the revocation case involved events antedating mid-July 1987, and because all of the violations found in the suspension case involved that same period, Clark could not impartially decide the revocation case issues.

Clark's admission of the suspension case transcript into the revocation case record does not demonstrate actual bias. In the circuit court Bo Peep argued that Clark erred in admitting that transcript but that court rejected the argument. In this Court Bo Peep does not directly assert that Clark erred in admitting the transcript. Instead, Bo Peep argues lack of impartiality and cites the same ruling. Under COMAR 10.05.01.10B (1988) the standard for imposing the sanction of permanent revocation of a license is "serious or repeated violations of any of the requirements of [the] regulations. . . ." Clark appropriately included in the revocation case the record underlying those violations found in the suspension case for the consideration of the Secretary's designee in determining whether permanent revocation was appropriate.

Applicable here is the rule stated in *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778, 793 (1966):

> "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."

This Court most recently gave recognition to the above rule in *Doering v. Fader*, 316 Md. 351, 558 A.2d 733 (1989)

which cites many cases to the same effect as *Grinnell*. We have also said that the rule applies to administrative agencies. *See Board of Medical Examiners v. Steward*, 203 Md. 574, 102 A.2d 248 (1954) (members of a hearing board who initially participated in the decision of a case which was appealed and remanded to the agency were not thereby disqualified from hearing the matter on remand).

Accordingly, we reverse. We shall, however, assess costs against the State. This is because the State devoted substantial portions of its briefs in chief and in reply to arguing the substantiality of the evidence, despite the fact that neither the circuit court nor Bo Peep has questioned the revocation order on that ground.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY REVERSED. CASE REMANDED TO THAT COURT FOR THE ENTRY OF A JUDGMENT AFFIRMING THE FINAL DECISION DATED AUGUST 31, 1988, OF THE SECRETARY, DEPARTMENT OF HUMAN RESOURCES, WHICH AFFIRMED THE DECISION OF THE HARFORD COUNTY HEALTH OFFICER TO REVOKE THE LICENSE OF BO PEEP DAY NURSERY. COSTS TO BE PAID BY APPELLANT.

APPENDIX B

IN THE CIRCUIT COURT
FOR
HARFORD COUNTY

Case No. 1998 - 5 - 99

IN THE MATTER OF BO PEEP DAY NURSERY SUSPENSION OF DAY CARE LICENSE

Case No. 2089 - 5 - 145

IN THE MATTER OF BO PEEP DAY NURSERY REVOCATION AND DENIAL OF RENEWAL OF DAY CARE LICENSE

FILED

March 9, 1989

MEMORANDUM OPINION AND ORDER

PRELIMINARY STATEMENT

The Court is keenly aware that many believe our forum will determine whether abuse took place at Bo Peep Nursery. Such is not the case, as the Court's mandated function is to review the proceedings before the Health Department to discern whether legal error was committed and whether the Hearing Officer had sufficient, substantial evidence before him to conclude that physical abuse took place. Thus, the Court will make no fresh factual determinations concerning the issue of abuse.

FACTS

Deborah Cassilly, Appellant, is the director and licensee of the Bo Peep Day Nursery in Bel Air. On July 6, 1987, tal Hygiene which resulted in (1) suspension of her day care license and (2) revocation/non-renewal of her license. The two appeals were consolidated and argument was presented to the Court on November 16, 1988.

I. SUSPENSION OF DAY CARE LICENSE - Case No.: 1998-6-99.

Deborah Cassilly, Appellant, is the director and licensee of the Bo Peep Day Nursery in Bel Air. On July 5, 1987, she received a letter from Mr. Thomas, who is a health officer for the Harford County Health Department. The letter suspended her day care license pending the outcome of a child abuse investigation being conducted by the Harford County Department of Social Services and the Bel Air Police Department. The suspension was premised upon parental complaints alleging numerous violations of Maryland's group day care center regulations and the possible abuse of children at Bo Peep.[1]

Pending Appellant's right to an administrative hearing on the issue of suspension of her day care license, Judge

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[1] The original complaints about Bo Peep were registered by the parents of a set of identical twins (children #1 and #2) who were attending the nursery. Their initial complaint was to the Department of Social Services. On June 18, 1987, the mother sent a letter of formal complaint to the Health Department regarding alleged sexual abuse of #1 at Bo Peep.

Additionally, the parents of child #9 complained to the Health Department about the nursery. No allegations of abuse were made concerning their little boy at this time. (#9 was later examined by Dr. Shubin on July 16, 1987 at which time the issue of sexual abuse as to this child arose). The predominant theme underlying their dissatisfaction with the center was a general lack of supervision over the enrollees. Parents of children #1 and #2 were also concerned about adequacy of supervision.

William O. Carr issued an Order banning all males from the day care center from 6:30 A.M. to 6:30 P.M. The Order, which was dated July 9, 1987, also gave the Health Department the right to monitor the Order to insure that no males were at the facility during the designated hours.

A short time later, however, Appellee came into Harford County Circuit Court seeking an ex parte injunction and an interlocutory injunction to close the day care center. The record reflects that the hearing for injunctive relief was promoted by an alleged incident of sexual abuse reported by the parents of child #7 which allegedly occurred despite the existing aegis of Judge Carr's earlier Order.

The hearing was held before Judge Whitfill, and he issued an Order on July 28, 1987. This Order essentially (1) barred Patrick Cassilly from the premises at all times[2] and required Appellant and her employees to report his presence to the Court if he should violate the Order; (2) mandated that a log be kept registering all males over the age of 12 who came to the facility; and (3) required that all injuries at Bo Peep be documented with notice of injuries to be provided to parents and the Health Department.

In late August and early September of 1987, the issue of suspension of Appellant's license was heard before William Clark, Hearing Examiner for the Department of Health and Mental Hygiene. In a decision dated November 11, 1987, Mr. Clark upheld the suspension of the day care license for the existing licensing period. Among the approximately one dozen COMAR regulations the State claimed Bo Peep failed to follow, the Hearing Examiner found that all but two had been violated by Appellant. The most significant infraction by Appellant was violation of

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[2] Patrick Cassilly is Appellant's husband. Up until this time, Appellant and Patrick Cassilly had been living in a third floor apartment at the center.

COMAR 10.05.01.46 which deals with injurious treatment of children attending day care centers.[3] The Hearing Examiner concluded that many children at Bo Peep were subjected to injurious treatment, including sexual abuse. In addition to upholding the license suspension, the Examiner went on to advise that if Appellant should seek to reapply for a license at the end of the current licensing period, "careful and meticulous review of that application, of the proposed staff of the Licensee, and/or the facility itself should be made by the Department." Hearing Examiner's Decision, p. 50.

On December 4, 1987, Appellant filed Exceptions to the Hearing Examiner's proposed decision. The decision, however, was affirmed by the Board of Review of the Department of Health and Mental Hygiene on March 23, 1988. The final agency decision, which upheld suspension of Appellant's current license, was issued shortly before the end of the current licensing term. The annual day care license in question was due to expire on March 31, 1988. Appellant appealed the agency decision suspending the license to this Court on March 24, 1988. Judge Whitfill, by Court Order, enjoined the Department of Health and Mental Hygiene from enforcing its final suspension decision. Said Order was to expire on March 30, 1988, at 8:00 o'clock P.M. Argument on suspension of Bo Peep's license to operate a group day care facility came before this Court on November 16, 1988.

II. NON-RENEWAL/REVOCATION OF DAY CARE LICENSE - Case No.: 2089-5-145.

As indicated above, the suspended day care license was due to expire, as a matter of course, on March 31, 1988.

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[3] This provision from COMAR states as follows: A child may not be subjected to treatment injurious to his physical or emotional health by a staff member or any individual connected with the center such as a substitute, volunteer, or person living in a household in which a center is licensed."

Appellant applied in a timely fashion for renewal of her day care license. In a letter dated March 26, 1988, however, Mr. Thomas of the Harford County Health Department, denied renewal of her license to operate Bo Peep and permanently revoked said license. The reasons for revocation of her license are set forth in Mr. Thomas' letter as follows:

> (1) I have evaluated your application and the licensing materials to determine if the continued operation of your Center is consistent with the legislative requirements set forth in Health General Section 14-102 and 14-104. In particular, I have reviewed the specific provisions of Section 14-104 requiring that group day care centers operate in a manner which provides children with safe conditions in addition to "proper care, protection and supervision." I have concluded that the continued operation of this center is not consistent with these statutory objectives.
>
> (2) Further, I am permanently revoking and denying renewal of your license on the basis of of the regulatory violations found in the decision of William F. Clark, Esq. dated November 16, 1987, a copy of which is attached hereto and incorporated herein. Specifically, I hereby adopt and incorporate the discussion, findings of fact and conclusions of law set forth in that decision. The regulatory violations upheld by Mr. Clark which continue to present a threat to the health and safety of children at this facility are as follows:
>
> COMAR 10.05.01.12- Minimum Age
> .18- Use of Unauthorized Space
> .49- Copy of Regulations to Parents
> .59- Group Size and Staffing, Children in Attendance

.60 and .76 - Staffing Pattern
.65- Records
.50A- Adequate Service and Supervision at all Times

The Hearing Officer in his findings stated that "the facts show that many of the day care regulations have not been followed. The sum of the evidence requires that the facility not only continue in operation with a license from the Department."

3. We continue to be deeply concerned over the management of the Center and the capability of the staff to provide for the adequate protection and supervision of the children. Based on our staff review of the Center's operations, we do not feel that there is adequate assurance that the continued operation of the Center under the existing staff will provide for appropriate supervision of children as required by COMAR 10.05.01.50A.

4. The hearing officer held there were repeated instances in which children enrolled in the center were subjected to injurious treatment in violation of COMAR 10.05.01.46. These findings reflected numerous deficiencies in the management, staffing and operation of this center. The continued operation of this center as detailed in your license renewal application is inconsistent with COMAR 10.05.01.46.

Appellant, once again, had an administrative hearing before Mr. Clark to appeal the non-renewal/revocation of her license. The thrust of that hearing, which was held during May and June of 1988, was to determine whether physical and sexual abuse of children occurred at Bo Peep. The Hearing Examiner found that abuse occurred at the facility and affirmed the decision to permanently revoke Appellant's day care license. Mr. Clark's decision was issued on August 23, 1988, and it was adopted as a final

decision on August 31, 1988. The revocation decision was appealed to this Court as well.

The decisions of the Department of Health and Mental Hygiene were stayed by Court Order pending final resolution of the appeals in this case.

STANDARD OF REVIEW

On the issue of judicial review of agency decisions, the Administrative Procedure Act provides as follows:

> (g) *Decision.* - In a proceeding under this section, the court may:
>
> (1) remand the case for further proceedings;
>
> (2) affirm the decision of the agency; or
>
> (3) reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision of the agency:
>
> (i) is unconstitutional;
>
> (ii) exceeds the statutory authority or jurisdiction of the agency;
>
> (iii) results from an unlawful procedure;
>
> (iv) is affected by any other error of law;
>
> (v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
>
> (vi) is arbitrary or capricious.

Annotated Code of Maryland, State Government, Section 10-215.

In a recent decision, the Court of Special Appeals restated, at some length, the standard of review which must guide this court in considering the final decision of the

Department of Health and Mental Hygiene in the appeals *sub judice*:

> "The Court's statutory role upon review goes very little beyond its inherent power of review to prevent illegal, unreasonable, arbitrary or capricious administrative action." *Harford Memorial Hospital v. Health Services Cost Review Commission*, 44 Md. App. 489, 506, 410 A.2d 22 (1980); *Chertkof v. Dept. of Natural Resources*, 42 Md. App. 10, 17, 402 A.2d 1315, *cert. denied*, 286 Md. 745 (1979).
>
> Where the agency has made no error of law, then, the standard of review is "whether the finding is supported by substantial evidence". *Nationwide Mutual Insurance Co. v. Insurance Commissioner*, 67 Md. App. 727, 737, 509 A.2d 719 (1986). In *Bulluck v. Pelham Woods Apts.*, 283 Md. 505 390 A.2d 1119 (1978), the Court of Appeals discussed this standard as well as other principles concerning judicial review of agency decisions:
>
> "Substantial evidence," as the test for reviewing factual findings of administrative agencies, has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."
>
> The scope of review "is limited to whether a reasoning mind reasonably could have reached the factual conclusion the agency reached," . . .
>
> In applying the substantial evidence test, we have emphasized that "a court should [not] substitute its judgment for the *expertise* of those persons who constitute the administrative agency from which the appeal is taken." We also must review the agency's decision in the light most favorable to the agency, since "decisions of administrative agencies are prima facie correct," and "carry with them the presumption

> of validity." Furthermore, not only is it the province of the agency to resolve conflicting evidence, but where inconsistent inferences from the same evidence can be drawn, it is for the agency to draw the inferences. (Citations omitted).

Bulluck, 283 Md. at 512-13, 398 A.2d 1119 (1978).

> . . . . "in reviewing decisions of administrative agencies, the court's appraisal or evaluation must be of the agency's fact-finding results and not an independent original estimate of or decision on the evidence, and that the required process requires restrained and disciplined judicial judgment so as not to interfere with the agency's factual conclusions where supported by evidence." *Zeitschel v. Board of Education of Carroll County*, 274 Md. 69, 82, 332 A.2d 906 (1975). Thus, even though a reviewing court may disagree with the conclusions drawn by an agency, it is not at liberty to disregard the agency's conclusions and substitute its own. *Nelson v. Real Estate Commission*, 35 Md. App. 334, 344-45, 370 A.2d 608, *cert. denied*, 280 Md. 733 (1977). Moreover, a reviewing court is restricted to the record made before the administrative agency, and is confined to whether, based upon the record, a reasoning mind reasonably could have reached the factual conclusion reached by the agency. (Citations omitted).

Maryland Retirement System v. Martin, 75 Md. App. 240, 244-245, 540 A.2d 1188 (1988).

In light of the foregoing, we now turn to a consideration of the arguments presented on appeal to this Court.

DISCUSSION

I. HAS THE DECISION TO SUSPEND BO PEEP'S LICENSE BECOME MOOT?

On November 16, 1987, the Hearing Examiner issued his proposed decision suspending the license of Bo Peep Day Nursery for the duration of its current licensing period. The suspended license was due to expire on March 31, 1988. Pursuant to Court Order, however, the day care center remained open throughout the licensing period in question. While the decision regarding nonrenewal/revocation of the day care license remains justiciable, we find that the decision suspending the license (which would have naturally expired about a year ago), is now moot.

While there is no Maryland case law directly on point, analogous law from other jurisdictions suggests the suspension decision is moot. *See, Jones v. Schwendiman*, 721 P.2d 893 (Utah, 1986). (Motorist's appeal from revocation of driver's license and request that his driving privileges be ordered reinstated was rendered moot by expiration of one year period of revocation); *Dow Chemical Co. v. Curtis*, 404 N.2d 737, (Mich. App. 1987), (Running of three year limitations period for Employment Security Commission to recover improperly paid benefits rendered case moot in regard to possible recovery of benefits); *North Dakota Rural Development Corp. v. U.S. Department of Labor*, 819 F.2d 199 (C.P. 8, 1987), (Rural development corporation's petition for review of denial of federal grant under Job Training Partnership Act, by Department of Labor, was rendered moot by imminent expiration of grant year, notwithstanding corporation's claim that vindication of its reputation within Department was still open and prevented mootness).

Appellant argues that the suspension decision is not moot in light of the fact that Mr. Thomas relied on Mr. Clark's suspension decision as the reason for revoking Appellant's

license as set forth in Thomas' letter of March 26, 1988. *See* Facts, *supra*. Given that the regulatory violations found at the first hearing were the basis for suspending Bo Peep's license, the suspension decision itself still remains moot. Alleged violations of COMAR regulations persisted as viable evidentiary issues throughout both hearings. Nevertheless, the actual decision to suspend a license long since expired (as opposed to evidence upon which the decision was founded), is of no legal interest to the parties at this juncture.

In denying reapplication for licensure, the proposed decision from the second hearing states as follows:

> In his letter dated March 26, 1988, the Health Officer cited COMAR 10.05.01.12, as well as Regulations .18, .49, .59, .60, .76, and .65, as continuing to be violated at present. Inasmuch as there was insufficient evidence proffered at this administrative hearing to support these contentions, this rationale for denying the reapplication for licensure is found to be unwarranted. However, his contention that COMAR 10.05.01.50A was violated, i.e. that adequate service and supervision at all times has been lacking, is upheld, as is the contention that children were subjected to injurious treatment in violation of COMAR 10.05.01.46.

Proposed Decision at 41. Except for COMAR 10.05.01.50A and 10.05.01.46, all other regulations found to have been violated at the suspension hearing did not impinge on the decision to permanently revoke the facility's license. Injurious treatment of children and adequate supervision at Bo Peep are the issues of legal significance, in that it is violation of these regulations upon which revocation is premised.

As a final note, there is some indication in the record, that Appellant recognizes that revocation, rather than sus-

pension, of the license is the major concern of those involved in these proceedings. In a hearing on exceptions taken from the first decision, Appellant's counsel stated as follows:

> In fact, I think you ought to think for a moment before I even get into the abuse allegations, why are we here. The license expires next week. *Isn't this a moot issue*?
>
> The issue before Mr. Clark was suspension of the license, but that's not what Mr. Clark decided. Read the last page of his decision. He far overstepped his charge and he recommended that the license be suspended and he went on in my judgment quite clearly, to say the license should be revoked. I see he made it clear that's the objective of the Health Department . . . .

(3/23/88, T. 11) (Emphasis added).

For the foregoing reasons, the decision to suspend Bo Peep's license for the licensing period ending March 31, 1988 is hereby moot.

II. DID THE EXAMINER ABUSE HIS DISCRETION BY DECLINING TO RECUSE HIMSELF FROM THE REVOCATION HEARING?

Prior to the commencement of the license revocation hearing, Appellant requested that Mr. Clark recuse himself as Examiner in the second proceeding. Mr. Clark was the Hearing Examiner at the first hearing, and he issued the agency decision suspending Appellant's license to operate a group day care facility. Appellant contends that the decision reflected pre-judgment and prejudice on the part of Mr. Clark. In the second hearing, it was argued that he would be presented with the same parties and the same issues necessitating his disqualification.

The bulk of Maryland case law deals with recusal of trial judges rather than hearing examiners. Whether a trial

judge recuses himself is a matter within the discretion of the Court, and the "decisions will not be disturbed on appeal except for an abuse of that discretion." *Harper v. Harper*, 49 Md. App. 339, 342, 431 A.2d 761, *rev'd. on other grounds*, 294 Md. 54 (1982). To obtain a reversal on appeal, "there must be an affirmative showing of bias or prejudice on the part of the trial judge." *Nash v. State*, 69 Md. App. 681, 686, 519 A.2d 769 (1987). Additionally, there is no *per se* rule requiring recusal based on participation in an earlier trial even if the judge is to act as fact finder in a subsequent proceeding. *Id.*

Appellant directs the Court's attention to *In re George G.*, 64 Md. App. 70, 494 A.2d 247 (1985) in support of its argument that Mr. Clark should have disqualified himself from presiding over the second hearing. That case involved multiple juvenile defendants accused of raping a young woman. The judge who presided over the bench trials of two of the defendants was asked by defense counsel to recuse himself from hearing the case of a third defendant. The trial judge refused to recuse himself even though he found the rape to be nonconsensual in the prior bench trials. The judge, while asserting his ability to act impartially, assured counsel that: " . . . . As far as I'm concerned, [a judge] tries the case as he sees it. *You might be able to prove that he is innocent.*" *Id.* at 77. This statement impermissibly assigned the burden of proof to the defendant. In finding that the trial judge erred in not recusing himself, the Court of Special Appeals noted that "that which had been subconscious came to the surface and caused an irreparable taint on the proceedings. It is that manifestation of the subconscious that projects the *appearance* of bias." *Id.* at 81. (Emphasis in the original).

Unlike *In re George G.*, the record before us does not reflect bias on the part of Mr. Clark. In denying the motion to have himself disqualified, the Hearing Examiner responded as follows:

> ". . . . I am going to deny your motion. Certainly, I understand your perspective for filing that motion. All I can do is assure you that my mind in this matter, starting today, is not in fact made up, and I believe that you may be reading more into that comment[4] I made about the review of the subsequent application than was intended when it was written.
>
> I honestly do not have a bias in this particular case, and all I can do is assure you today that you and your client will be afforded a fair and full hearing."

In the administrative setting, it is true that due process requires an unbiased decision maker. *Withrow v. Larkin*, 421 U.S. 35, 95 S.C. 1456, 43 L. Ed. 2d 712 (1975). (Members of State Medical Board were not constitutionally precluded from holding adversary hearing on matter of possible suspension of physician's license on basis of charges evolving from Board's own investigation.) The Supreme Court in *Withrow* stated:

> Not only is a biased decisionmaker constitutionally unacceptable but "our system of law has always endeavored to prevent even the probability of unfairness." (Citations omitted). In pursuit of this end, various situations have been identified in which experience teaches that the

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[4] The comment being referred to is found at the end of the Hearing Examiner's first decision suspending Appellant's license. The final paragraph of his decision reads as follows: "The agency is seeking to have the license of this facility suspended. In light of the Findings of Fact and Conclusions of Law set out above, it is my recommendation that the license of Bo Peep Day Nursery be suspended for the duration of the current licensing period. Should, at that time, the Licensee seek to reapply, careful and meticulous review of that application, of the proposed staff of the Licensee, and of the facility itself should be made by the Department.

> probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him.
>
> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

95 S Ct. at 1464.

While there is very little Maryland law regarding disqualification of hearing officers because of prejudgment or bias, it has been recognized elsewhere that a hearing officer is not biased, either in fact or in law, simply because he previously ruled against one of the parties. *Converse v. Udall*, (Dist. Ct., Oregon) 262 F. Supp. 583 (1966), *aff'd* 399 F. 2d 616 (1968), *cert. den.* 89 S. Ct. 635, 393 U.S. 1025, 21 L. Ed. 2d 569 (1969). The fact that Mr. Clark's suspension decision went against Appellant does not preclude him from presiding over the revocation hearing.

One case in which it was ruled that a hearing officer should not have presided on a rehearing over a case he initially decided was *Spratt v. Dept. of Social Services*, 426 NW 2d, 780, Mich. App. (1988). The hearings involved

denial of Mr. Spratt's claim for Aid to Dependent Children premised on his unemployment. The hearing examiner's "comments on the record on rehearing indicates that he may have prejudged the case. When asked by claimant to disqualify himself on the basis of bias, the hearing officer stated, 'And, as far as making erroneous conclusions, I still believe I made the proper conclusions at the time.' Moreover, the hearing officer failed to correctly carry out the [State] Supreme Court's Order remanding the case . . . . Accordingly, we hold that claimant is entitled to a rehearing before a different hearing officer." *Id.* at 783-784.

Regarding the appeals before this Court, review of the transcript from the second hearing does not demonstrate prejudgment or bias on the part of the Hearing Examiner. Adverse rulings on motions and evidentiary objections during the hearing do not, in and of themselves, amount to an affirmative showing of bias or prejudice on the examiner's part. Therefore, this Court concludes that it was not an abuse of discretion for Mr. Clark to refuse to disqualify himself from the revocation hearing.

The Appellant strongly advances that Mr. Clark was "pre-programmed" to rule in favor of the state, thus was biased. The short answer to this contention is that the record does not demonstrate that conclusion. We will not presume prejudice from the Appellant's unsupported assertion. We can understand her concern, however, in that the Hearing Officer is employed by the Maryland Department of Health and Mental Hygiene which was the very agency seeking suspension and revocation. We can appreciate that the Appellant feels like she is marching into the jaws of the lion where the adjudicatory and adversary roles rest in the same government agency. Unfortunately, this arrangement is sanctioned by Maryland statutes and similar situations have survived judicial scrutiny. *See Withrow v. Larkin, supra.*

III. WAS THERE A DENIAL OF DUE PROCESS OF LAW?

In this instance, two sets of hearings were conducted lasting many days. The hearing were before Hearing Officer, William F. Clark, who made recommended decisions. The evidence was largely from parents, doctors, social workers and a psychologist. These witnesses testified as to what the affected children told them concerning abuse at Bo Peep. The children did not testify at the hearings, nor were they made available to the defense for questioning by counsel or any other designated individual. We hold that the children's out-of-hearing statements were *foundational* to the case as the State would not have a case without these statements. Any evidence from which it could be concluded that the abuse took place at Bo Peep rested upon the credibility on the out-of-hearing statements of the children. The psychologist, social workers and parents all based their opinions and testimony on the childrens' statements. Without these statements, the psychologist and social workers could not have implicated Bo Peep. Thus without the childrens' statements, the evidence would have reduced to the bare situation of eight Bo Peep attendees showing medical signs of physical abuse (per Dr. Shubin and Dr. Reichel). With just that, the Hearing Officer could not have concluded that the abuse took place at Bo Peep by the mere coincidence that each physically abused child attended the same day care facility. To hold otherwise would be conjectural and well shy of a preponderance of evidence. Accordingly, the out-of-hearing assertions were of critical importance and the foundation on which the balance of critical evidence depended.

Since the credibility of the childrens' out-of-hearing assertions was key to the case, the defense asked for the opportunity to have their psychologist speak to the children. Presumably, this would have permitted the defense to test the credibility or believability of the evidence that was never directly before the Hearing Officer (out-of-hear-

ing statements). The request was denied (T. 5/11/88, page 20).

Even though not afforded the opportunity to examine the children, the Appellant's psychologist was permitted to review the evidence presented by the State and opined upon the credibility of the out-of-hearing declarations. The Hearing Officer took this testimony as meaningless, since Dr. Donner merely read "a cold record" (proposed decision, page 35).

Citizens in many countries of our world have no check or guarantee against arbitrary governmental action concerning their lives or property. Unfortunately, this aspect of liberty is lacking for those persons. Blessedly, our ancestors had the wisdom to amend the Federal Constitution in 1868 and provide that State governments shall not deprive any person of life, liberty or property without due process of law. Section 1 of the Fourteenth Amendment of the United States Constitution provides as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State of where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

In this case, we must determine the process that is due concerning out-of-hearing statements where the State seeks to suspend and/or revoke the license of a day care facility.

Under the Maryland Administrative Procedure Act (Maryland Code, State Government Article, Section 10-201, et seq.) when the Health Department sought to suspend and later revoke Bo Peep's Day Care License a hearing

was convened. Under the law, the hearing is a "contested" one since the proposed action was resisted by the Appellant. *See* Maryland Code, State Government Article, Section 10-201. The Administrative Procedure Act does not detail the exact procedures or rules that are to be abided. The Act does provide, however, for very broad discretion in admitting probative evidence. Maryland Code, State Government Article, Section 10-208. It has long been held that administrative agencies are not bound by the common law rules of evidence. *Fairchild Hiller Corporation v. Supervisor of Assessments*, 267 Md. 519, 298 A.2d 148 (1973). The law also mandates a notice requirement. Maryland Code, State Government Article, Section 10-205. Beyond that, there is very little in the way of specific procedure. Such permits State agencies great latitude in the conduct of proceedings.

Since one may not operate a day care center without State licensure, no one would question that the Appellant's property interests are at stake. It is also given to little question that the due process requirement of the Fourteenth Amendment applies to State Administrative Agency hearings. *Board of Medical Examiners v. Stewart*, 203 Md. 574, 102 A.2d 248 (1954). Due process is a flexible concept depending on the character of the administrative setting. As an example, due process under the Maryland Administrative Procedure Act requires a hearing before suspension or revocation of a day care license. On the other hand, some administrative actions do not require advance hearings before action is taken. *See Matthews v. Delbridge*, 424 U.S. 319 (1976) (Disability benefits). While due process requirements are flexible in the administrative setting, the methods used to arrive at decisions affecting property interests must be protected by the "rudimentary requirements of fair play" (emphasis added). *West Ohio Cas. Company v. Public Utilities Commission*, 55 S. Ct. 316, 294 U.S. 63 (1935); *State Ex Rel Madison Airport Co. v.*

Wrabetz, 285 N.W. 504, 231 Wis. 147 (1939); *Dickenson-Tide-water v. Supervisor*, 273 Md. 245, 329 A.2d 18 (1974).

Maryland decisional law has long held that hearsay evidence is admissible in the administrative setting. *Bethlehem Steel v. Taylor*, 158 Md. 116, 148 At. 246 (1929). *Waddell Cole v. Chisholm*, 163 Md. 49, 161 At. 276 (1932). *Fairchild Hiller v. Supervisor, supra.* In fact, an administrative decision may be based solely on hearsay if credible and of sufficient probative value. *Fairchild Hiller v. Supervisor, supra.* Our decision in this case does not conflict with this rule, as we are concerned only with the opponent's right to test the credibility of the hearsay or other out-of-hearing statements.

The Court holds that in contested proceedings under the Maryland Administrative Procedure Act, due process of law requires that the opponent have a *meaningful* opportunity to test the credibility of out-of-hearing statements where the agency decision is foundationally based on such statements *or* is totally based on such statements.[5] Put another way, basic fair play requires a meaningful opportunity to test credibility where the decision rests on evidence from persons who do not appear. The Court has not been referred to nor found any case authority with holdings and facts identical to this case. We do, however, follow with references to authorities with issues that are similar.

In *Arkansas Public Service Commission v. Continental Telephone Company*, 561 S.W. 2d 645, 262 Ark. 821 (1978), the Supreme Court of Arkansas held that due process requires a party to have a reasonable opportunity to present rebuttal evidence on an important aspect of the case.

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[5] We are not concerned with the issue of whether the statements qualify as hearsay, since the due process right to test credibility would apply whether or not the statements have indicia of trustworthiness. In other words, the Court's holding will apply to hearsay and non-hearsay statements.

In that instance, some eleventh hour evidence was presented by the opposing party. Understandably, the public utility party asked for a continuance to prepare a rebuttal presentation. The request was denied by the administrative agency. The Court held at pages 654 and 655 as follows:

> "A full and fair hearing is a fundamental requirement of due process in the determination of the reasonableness of rates . . . . . The opportunity to submit evidence to rebut charges or adverse claims and testimony is an essential requirement of a full and fair hearing . . . . . To meet due process requirements a hearing must afford a utility the right to reasonably know the charges and the right to meet such charges by competent evidence . . . . . Where reliance is placed by an administrative agency upon testimony of certain witnesses in making a critical factual determination, it will be an abuse of discretion to fail to hear material evidence which might impeach, not only the testimony, but the findings made by the agency as well . . . . . The commission must necessarily have a wide latitude of discretion in conducting and expediting the many hearings it must hold. Fundamental fairness requires, however, that, where expert or technical testimony is essential to a proper response to testimony adverse to it, adequate opportunity must be given to present testimony in rebuttal."

We also reference *Wilner v. Committee on Character*, 373 U.S. 96, 83 S.Ct. 1175 (1963). In that case, the Supreme Court, through Mr. Justice Douglas, held that a New York Bar applicant was denied due process where the Character Committee did not advise him of the basis of their action, nor provide him with an opportunity to rebut the evidence.

The Maryland decision of *Rogers v. Radio Shack*, 271 Md. 126, 314 A.2d 113 (1974), is helpful and instructive. That matter was an administrative appeal from the Employment Security Administration where the appellant had been found guilty of ordinary misconduct concerning his employment, thus disqualifying him from receiving benefits for a period of ten weeks. Once the matter was appealed to the Circuit Court, the appellant first learned that the record contained an investigator's written report. It was not an item that was introduced at the administrative hearing level. The appellant complained that the report (an out-of-hearing written statement) should not have been considered since there was no opportunity for cross examination or rebuttal. There was no such opportunity, as Rogers was first made aware of the existence of the report after an appeal had been filed with the Circuit Court. Judge Eldridge, speaking for the Court of Appeals, held at page 129:

> Administrative agencies, while not bound by common law rules of evidence, "must observe the basic rules of fairness as to the parties appearing before them. *Dal Maso v. Board of County Commissioners*, 238 Md. 333, 337, 209 A.2d 62, 64 (1965). We agree with Rogers that under the circumstances here, with no opportunity for cross examination or rebuttal, fundamental fairness would preclude reliance upon the report by an administrative agency or a reviewing court." (Emphasis supplied).

The *Dal Maso* decision referenced in the preceding paragraph stands for the proposition that where evidence (a staff report) will be relied upon by the administrative agency, fundamental fairness requires some opportunity to examine and challenge the evidence. Procedural fairness was afforded in that instance to the appellant where he had an opportunity before the board reached its decision, to examine the staff report and challenge it.

From the above authorities, it is clear that due process in a contested administrative setting requires an opportunity to meet or rebut adverse evidence and when there is no such opportunity, it is error for the administrative agency to rely upon the unchallenged adverse evidence. It follows therefore, that the appellant has a due process right to challenge or test adverse evidence. Our holding in this case simply elaborates on that basic proposition where the case largely rests on out-of-hearing statements.

In deciding the due process issue, the Court is aware a balancing of competing interests must be considered. *California v. Byers*, 91 S. Ct. 1535 (1974). In order to weaken or eliminate Appellant's right to due process, the public need or interest must outweigh the due process right to test credibility. In this case, the State's interest is not so compelling so as to evaporate Appellant's right to basic procedural fairness. The government's basic interest is to protect against child abuse. Allowing the Appellant an opportunity to test credibility has no adverse impact on the government's goal. The State also has an interest in minimizing impact upon children through further examination or in hearing testimony. Such involvement will no doubt have some impact on the children and at a minimum, produce some stress. While this is true, the Court finds that the State's protective interest is not so strong or compelling so as to have priority over Appellant's right to a fair hearing.

The Court holds that Appellant was denied due process of law since there was no meaningful opportunity to test the credibility of the childrens' out-of-hearing statements. As previously discussed, their statements were foundational to the case. What is a meaningful opportunity will vary from case to case. We first observe that cross examination did little to test credibility since the respective declarants were not at the hearing. In this situation, a meaningful opportunity would have resulted if Dr. Donner could have interviewed the children. This request was de-

nied. His testimony was totally discounted due to his lack of personal contact. The State will argue that the Hearing Officer had no authority to order the interviews. This is correct, but the Hearing Officer should not have considered any of the evidence which was dependent on the foundational out-of-hearing statements where circumstances prevented an opportunity to challenge. *Rogers v. Radio Shack, supra.* As previously noted, there would be insufficient evidence to conclude that abuse took place at Bo Peep absent the out-of-hearing assertions.

In summary, Appellant was denied due process in not having an opportunity to test credibility of the out-of-hearing statements. Additionally, the Appellant was denied due process of law since the Hearing Officer considered the out-of-hearing statements in making his decision where there was no opportunity to test credibility. Since he considered the statements, his decision was arbitrary under Section 10-215 of the Administrative Procedure Act.

As previously mentioned, this due process requirement only applies where the decision is totally based on out-of-hearing statements or is foundationally related to the balance of critical evidence. We hold that due process does not require the opportunity to test the credibility of out-of-hearing statements where the decision is not based totally on such statements or based on such statements which are foundational. For instance, if the decision is based on out-of-hearing statements and probative evidence that is not foundationally dependent on the statements, then the Court's holding would not apply.

We are not unmindful that our decision may require children's in-hearing testimony, examination by professionals or examination by counsel. No doubt this added involvement will cause the children some stress. We regret that such is the case, but it is necessary to accommodate the constitutional guarantee of basic fair play. We would hope and expect that these procedures would be engaged

in such a manner so as to minimize the impact upon the children.

We are also mindful that our decision verifies an existing adversarial process. Under the Administrative Procedure Act, each side presents its own evidence and selects its own experts. By law, each side is pitted against the other in a contested hearing before an administrative hearing officer. There are those who espouse a position that the adversarial process is the wrong procedure to determine issues related to child abuse. There is an attractiveness to this argument, since the adversarial process encourages each side to hire their own experts who will most probably have differing views. On a daily basis, we see the expert "hired gun" approach, especially in the areas of personal injury and condemnation litigation. This may not be ideal to fact-finding concerning child abuse, but the Administrative Procedure Act or other law does not have a recognized procedure that will insure the competence and impartiality of experts. Unless and until statutory law is charged that so provides, we are stuck with the adversary process, where each side selects and hires their own professionals.

The government's power to destroy is awesome. Our forebears recognized this truism when enacting the Fourteenth Amendment to guard against fundamentally unfair governmental action. This basic principle of due process protects Appellant in this case and will prevent license revocation based primarily upon untested out-of-hearing statements. We sympathize with Appellant's feeling of helplessness. She had no meaningful way to test or challenge the credibility of the State's evidence against her. The unfairness that visits this case requires reversal and remand.

IV. DID RESTRICTION OF SERGEANT SWAM'S TESTIMONY IMPERMISSIBLY DEPRIVE APPELLANT OF HER RIGHT OF CROSS EXAMINATION?

During the suspension hearing, the State called Sergeant Joseph Swam as one of its witnesses. He is employed by the Bel Air Police Department and participated in the interagency investigation regarding allegations of child abuse pursuant to Title 5, Subtitle 9 of the Maryland Family Law Article.

On direct examination, he discussed investigative approaches when multiple victims are involved. He stated that the investigative concern often turns on whether the victims have something in common. In his testimony, it was brought out that the common denominator in the current investigation was the children's attendance at Bo Peep. The officer went on to testify that he spoke with Appellant on August 6, 1987. She had concerns about the grandfather of child number 6 and the father of children 1 and 2, and suggested that they be investigated. When asked about his investigation subsequent to the discussion with Appellant, he was eventually allowed to reply that he gave polygraph examinations as a routine method of eliminating suspects.

On cross examination, the Sergeant was asked who he had contacted in the course of his investigation. The Sergeant felt that answering such questions would compromise the ongoing criminal investigation. He refused to answer, relying on the statutory right of permissible denial, as set forth in Maryland State Government Code Annotated, Section 10-618(f), which states as follows:

> (f) Investigations. - (1) Subject to paragraph (2) of this subsection, a custodian may deny inspection of:
>
> (i) records of investigations conducted by the Attorney General, a State's Attorney, a city or county attorney, a police department, or a sheriff;

(ii) an investigatory file compiled for any other law enforcement, judicial, correctional, or prosecuting purpose; or

(iii) records that contain intelligence information or security procedures of the Attorney General, a State's Attorney, a city or county attorney, a police department, or a sheriff.

(2) A custodian may deny inspection by a person in interest only to the extent that the inspection would:

(i) interfere with a valid and proper law enforcement proceeding.

(ii) deprive another person of a right to a fair trial or an impartial adjudication;

(iii) constitute an unwarranted invasion of personal privacy;

(iv) disclose the identity of a confidential source;

(v) disclose an investigative technique or procedure;

(vi) prejudice an investigation, or

(vii) endanger the life or physical safety of an individual.

The Sergeant's contacts with individuals became part of the investigative record and he, therefore, invoked the foregoing statutory provision.

This Court, however, has great difficulty accepting the gross restrictions placed on the officer's testimony during cross examination. On direct, he was asked about his investigation. He discussed his interview with Appellant as part of the ongoing investigation in this case, and he admitted using polygraphs to eliminate suspects. His testimony on direct opened the door for questions about his

investigation on cross examination. Additionally, while "[a] particular document may not be available to 'any person' under the Public Information Act in light of the Act's exceptions . . . procedural due process requirements may yet make that same document available to a party, or unavailable for use against a party, in an administrative or judicial proceeding." *Superintendent, Maryland State Police, et al, v. Henschen*, 259 Md. 468, 474, 369 A.2d 558 (1977). In light of testimony on investigative efforts presented on direct examination, we find that it was error to allow the Sergeant to invoke permissible denial when its effect was to virtually deny Appellant's right to inquire into his investigation on cross examination.

Appellee argues that cross examination of the officer was necessarily restricted because of the strict confidentiality requirements governing disclosure of child abuse investigations as enunciated in Maryland Article 88A, Section 6(b) (1987 Supp.):

> (b) Child abuse or neglect. - Except as otherwise provided in Title 5, Subtitle 9 of the Family Law Article, all records and reports concerning child abuse or neglect are confidential, and their unauthorized disclosure is a criminal offense subject to the penalty set out in subsection (e) of this section. Information contained in reports or records concerning child abuse or neglect may be disclosed only:
>
> (1) Under a court order;
>
> (2) To personnel of local or State department of social services, law enforcement personnel, and members of multidisciplinary case consultation teams, who are investigating a report of known or suspected child abuse or neglect or who are providing services to a child or family that is the subject of the report;
>
> (3) To local or State officials responsible for the administration of the child protective service as necessary to carry out their official functions;

(4) To a person who is the alleged child abuser or the person who is suspected of child neglect if that person is responsible for the child's welfare and provisions are made for the protection of the identity of the reporter or any other person whose life or safety is likely to be endangered by disclosing the information;

(5) To a licensed practitioner who, or an agency, institution, or program which is providing treatment or care to a child who is the subject of a report of child abuse or neglect; or

(6) To a parent or other person who has permanent or temporary care and custody of a child, if provisions are made for the protection of the identity of the reporter or any other person whose life or safety is likely to be endangered by disclosing the information.

In discussing the legislative purpose behind the above cited statute, the Court of Special Appeals recognized that "the purpose behind the non-disclosure laws is to encourage the reporting of child neglect cases. To accomplish that objective, the Legislature conferred immunity upon the informant who acts on a reasonable belief." *Freed v. Worcester County Department of Social Services*, 69 Md. App. 447, 454-55, 518 A.2d 159 (1986). A review of the record in these administrative appeals reveals that protecting the identity of informants who report abuse is not of paramount concern. Indeed, identities of those alleging the occurrence of abuse at Bo Peep are known and many of them have testified in previous proceedings.

In light of the Court's holding, appropriate cross examination of Sergeant Swam will be permitted on remand.

V. WAS THE TRANSCRIPT FROM THE SUSPENSION HEARING PROPERLY ADMITTED INTO EVIDENCE AT THE REVOCATION HEARING?

It is Appellant's contention that the Hearing Officer erred by admitting the transcript from the suspension proceeding into evidence at the subsequent revocation case. In light of existing statutes and case law, we cannot agree with Appellant's argument. This Court holds that it was not error for the Hearing Examiner to admit the transcript of the earlier proceeding into evidence.

Under the Administrative Procedure Act, it is codified that:

> § 10-208. Evidence.
>
> (a) In general. - (1) Each party in a contested case shall offer all of the evidence that the party wishes to have made part of the record.
>
> (2) If the agency has any evidence that the agency wishes to use in adjudicating the contested case, the agency shall make the evidence part of the record.
>
> (b) Probative evidence. - The agency may admit probative evidence that reasonable and prudent individuals commonly accept in the conduct of their affairs and give probative effect to that evidence.

State Government Article, Section 10-208.

In *Redding v. Board of County Commrs.*, 263 Md. App. 94, 282 A.2d 136 (1971), tape recordings of a disciplinary board hearing were admitted into evidence at a subsequent hearing before a Board of Appeals. Appellant attempts to distinguish this case by pointing out that in *Redding*, there was no objection offered to admittance of the tapes. In the present case, Appellant strenuously objected to admitting the suspension transcripts (5/11/88, T. 68 - 72; 76). This distinction is strained at best. It is conceivable that

the tapes in *Redding* would have been entered into evidence even if objection to them had been made. This is especially so in light of the fact that the tapes indicated that Redding's counsel was afforded the right of cross examination and that hearsay is "admissible before an administrative body in contested cases and, indeed, if credible and of sufficient probative force, may be the sole basis of the decision of the administrative body". *Id.* 263 Md. at 110.

Before this Court, Appellant's counsel pointed out that the Hearing Examiner picked and chose what he wanted from the transcript. However, it is to be borne in mind that the Hearing Examiner was not bound to accept all or any part of the testimony contained in the suspension hearing. *Id.*

Additional support for allowing the prior transcript into evidence can be found in *Eichberg v. Maryland Board of Pharmacy*, 50 Md. App. 189, 436 A.2d 525 (1981). In an agency action revoking the pharmacy license of Mr. Eichberg, testimony from a prior criminal proceeding against him was admitted at the hearing before the Board of Pharmacy. The prior criminal adjudication against Eichberg resulted in a mistrial and the pharmacist subsequently entered an *Alford* plea. *Id.* 50 Md. App. at 190. The Court of Special Appeals held that the testimony from the criminal proceeding was admissible since Eichberg had extensively availed himself of the opportunity for cross examination. *Id.* at 194. Similarly, the suspension transcript reveals that counsel was present and exercised the right to cross examine witnesses.

Moreover, this Court agrees with Appellee that the fact that the suspension decision is pending appeal does not impair the admissibility of the transcripts. In argument before the Hearing Examiner, on admission of the transcripts, Appellant's counsel suggested the following:

> Why don't we wait until the Court of Appeals rules, if that's where it goes. Then it has finality,

> but it is not the law of this case yet. The record is not closed. (5/11/88, T. 70).

The fact that the record is not closed should not impinge on the evidentiary decision regarding admission of the transcript. The appeal process can often take years. It is already a year and a half since the suspension hearing. The transcripts contain testimony that was germane to the second proceeding. It is the testimonial evidence in the transcripts rather than the Hearing Examiner's first decision which is at issue. Admission of the transcripts also precludes the duplicative exercise of recalling witnesses, such as physicians, whose testimony would not change. We find that *admission* of the suspension transcript was not error, except that it was error for the Hearing Examiner to rely on any evidence therein which was foundationally based on children's out-of-hearing statements. *See* Part III hereof, *supra*.

VI. WAS REINSPECTION OF BO PEEP DAY NURSERY A LEGAL PREREQUISITE FOR NON-RENEWAL/REVOCATION OF THE DAY CARE LICENSE?

In his letter dated March 26, 1988, Mr. Thomas denied renewal of Appellant's day care license and permanently revoked said license. While we agree with the State that reinspection is not required before revoking a license, we do find that COMAR 10.05.01.07 mandates reinspection as part of the renewal procedure, and failure to reinspect was error.

COMAR 10.05.01.07 states that "[a] license automatically expires one year after issuance. The renewal procedure for a license *shall* include a reinspection and reevaluation of the center by the local health officer and appropriate authorities . . . . . " (emphasis added). Catherine Brown is a child development specialist for the Harford County Health Department. She testified that no inspection of Bo Peep was undertaken at the time of Appellant's renewal application. (5/27/88, T. 160). Indeed, she testified

that Mr. Thomas specifically told her not to do an inspection (5/27/88, T. 161).

The State argues that failure to reinspect as part of the renewal process was not required because it views the word "shall" in the regulation to be directory rather than mandatory. The State relies on *Hitchens v. City of Cumberland*, 215 Md. 315, 138 A.2d 359 (1958), for the proposition that whether "shall" is mandatory or directory "turns upon the intention of the legislature as gathered from the subject matter as the purposes to be accomplished." *Id.* 215 Md. at 323. In a subsequent decision, however, the Court of Appeals did "not feel that the *Hitchens* case [could] be relied upon to overturn a long established rule that 'shall' is presumed to be mandatory and 'will' directory." *Rizzi v. Governor of Maryland*, 255 Md. 698, 713, 259 A.2d 65 (1969).

Cases cited to this Court in which a directory, rather than a mandatory, interpretation of statutory language was imposed dealt with rules involving times by which certain acts were to be performed. *See, Resetar v. State Board of Education*, 284 Md. 537, 399 A.2d 255 (1979) (Rule requiring Board of Education to render its decision within thirty (30) days of receipt of hearing examiner's findings found to be directory); *Director v. Cash*, 269 Md. 331, 305 A.2d 833 (1973), *cert. den.* 414 U.C.S. 1136 (1974) (law requiring that treating professionals at Patuxent Institute "shall state their findings in a written report . . . to the court, not later than six months from the date said person was received in the institution for examination . . . " was directory, not mandatory); *Maryland State Bar Asso. v. Frank*, 272 Md. 528, 325 A.2d 718 (1974) (Rule requiring prosecution of disbarment proceedings within sixty day period was directory rather than mandatory); *Pope v. Secretary of Personnel*, 46 Md. App. 716, 420 A.2d 1017 (1980) (Ninety day hearing requirement in State employee discharge hearings was directory).

COMAR 10.05.01.07 is very different. It quite plainly states that "renewal procedure . . . shall include a reinspection". We agree with the State that the purpose behind group day care licensing regulations is the protection of children from mental and physical risks while they attend licensed facilities. Health General Article, Section 14-102 (a). The protection of children requires a mandatory interpretation of the word "shall". The Court can think of few things more important to the safety of children than a mandatory requirement that day care centers be inspected prior to relicensing.

If we accept the State's position that the regulation is directory, however, the Health Department could decide to renew a license without reinspection. A day care facility operating in gross violation of applicable COMAR regulations in a preceding licensing year could conceivably be relicensed without an inspection and continue to operate in violation of regulations. Therefore, a directory interpretation of 10.05.01.07 would not optimally protect children. The best way to protect children is to require mandatory reinspection of day care facilities on an annual basis. A mandatory interpretation of the word shall is clearly indicated in order to insure that children attending day care centers are protected.

In the present case there was no inspection and the license was not renewed. Appellant testified that she contacted Mr. Thomas in January of 1988 because she had not received her usual renewal packet. (5/31/88, T. 124). He told her that he would put it in the mail and she did receive it a couple of days later. (5/31/88, T. 124 - 125). Mr. Thomas indicated that he received the application, but that there was some concern about the staffing pattern. She mailed in another staffing pattern and did not hear from Mr. Thomas until his letter of March 26, 1988, denying her renewal request and revoking her license. (5/31/88, T. 125 - 126).

Furthermore, in his first decision, the Hearing Examiner stated that if Bo Peep were to reapply for a license, that "careful and meticulous review of that application, of the proposed staff of the licensee, and of the facility itself should be made by the department." Proposed Decision, p. 50. In light of the Hearing Examiner's directive for meticulous review of reapplication for a license and the fact that the department accepted her application, the department was compelled by COMAR 10.05.01.07 to reinspect the center before denying renewal of her day care license.

In light of our holding that COMAR 10.05.01.07 requires the department to reinspect the facility as part of the renewal process, we must now determine if an exception existed which would have precluded the department from following the dictates of its regulation. As a general rule, "[i]t is well established that rules and regulations promulgated by an administrative agency cannot be waived, suspended, or disregarded in a particular case as long as such particular rules and regulations remain in force." *Hopkins v. Maryland Inmate Grievance Commission*, 40 Md. App. 329, 335, 391 A.2d 1213 (1978). *See also, U.S. Ex Rel Accardi v. Shaughnessy*, 347 U.S. 260 (1964).

In *Board of Educ. of A.A. Co. v. Barbano*, 45 Md. App. 27, 411 A.2d 124 (1980). The Court noted that:

> There are recognized exceptions to the rule that an agency must carefully follow its own procedural requirements. . . . . E.g., *American Farm Lines v. Black Ball Freight*, 397 U.S. 532, 25 L. Ed. 2d 547 (1970) and *Matthews v. Walter*, 512 F.2d 941 (D.C. Cir. 1975) (where procedural rules are intended to ensure 'the orderly transaction of agency business', as opposed to being 'intended to "confer important procedural benefits" upon the parties before the agency'.); *Taylor v. Maryland School for the Blind*, 409 F. Supp. 148

> (D. Md. 1976), *affd.* 542 F.2d 1169 (4th Cir. 1976) ('some greater interest was served by the violation'). (Emphasis added).

45 Md. App. at 38.

We do not view COMAR 10.05.01.07 as a regulation designed to insure the orderly transaction of agency business. The State relies on *Taylor* in its deviation from the reinspection requirement by claiming that Bo Peep "is in fact differently situated than those to whom the regulation is applied" and that "some greater interest was served by the violation" of COMAR 10.05.01.07. *Id.* at 38. The thrust of the State's arguments is premised upon what it feels to be "conclusive proof" of physical and sexual abuse occurring at the facility. Its arguments cannot stand, however, in light of the Court's holding that conclusions of abuse reached in the administrative proceedings denied Appellant her right to due process since she had no opportunity to test the credibility of the children's out-of-hearing statements, which were foundational to the case. *See* II, *supra*.

We therefore hold that it was incumbent upon the State to reinspect the day care facility before deciding not to renew its license. This matter will be REMANDED for further proceedings in accordance with this Opinion.

VII. WERE THE EXAMINER'S FACTUAL FINDINGS ERRONEOUS AS A MATTER OF LAW?

The fulcrum upon which the State's decision to suspend and revoke Appellant's license rests is the finding that children were abused at Bo Peep Day Nursery. While we find that the record contains substantial evidence indicating that individual children were abused, we also hold that the factual finding that abuse of the children could only have occurred at Bo Peep is erroneous as a matter of law. It is to be borne in mind that we are not deciding whether or not Bo Peep was the situs of abuse. The fact that

Appellant was denied the fundamental right to challenge the evidence presented against her facility, however, necessarily precluded the Hearing Examiner from relying on children's unchallenged out-of-hearing statements made to parents and therapists in reaching the conclusion that the pre-schoolers were abused at Bo Peep. *See* Part III, *supra*.

The unrebutted medical testimony of two physicians[6] provided substantial evidence to support a factual finding that individual children had been sexually abused. Appellant argues that the physical findings observed during medical examination did not correlate with the statements made by children, and that Dr. Shubin should have taken a history of the children. Dr. Spodak also testified in the suspension hearing that, in his opinion, a history is an important part of an examination. The record reflects that Dr. Shubin gives explanations for his practice of not getting histories when looking for signs of sexual injury. (8/31/87, T. 850 - 859). It was not error for the Hearing Examiner to accept Dr. Shubin's findings that certain children examined by him experienced sexual injury. Whether histories were taken or not goes only to the weight given the evidence. The fact that there may be discrepancies between physical findings and statements made by children does not impugn objective physical findings of sexual injury. Rather, such discrepancies go to the credibility of out-of-hearing statements made by the children.

Child number 7 made statements regarding abuse which allegedly took place at Bo Peep on July 15, 1987. In the hearing before Judge Whitfill for injunctive relief, said hearing being sparked by number 7's allegations of abuse, there was overwhelming testimony that Pat Cassilly and Martha Scarborough were not at the facility on the day

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[6] We do not find that it was error on the part of the Hearing Examiner to refuse Appellant's attempts to have Dr. Donner, a psychologist, give an expert opinion on the medical findings of Drs. Shubin and Reichel.

in question. The child claimed that they were present. The Hearing Examiner in his suspension decision stated that "[i]t would appear from the testimony given at this hearing that the date of the incident is wrong." Proposed Decision, page 11. Testimony at the hearing negated the allegation that number 7 was abused on July 15 at Bo Peep. While we may feel that Judge Whitfill's finding at the hearing could have served as a red flag regarding the credibility of number 7's story, the Hearing Examiner is entitled to make his own findings of fact. Dr. Shubin examined child number 7 on July 17th and testified that he could not fix the exact date of her injury. He stated that the injury could have happened between 4 - 6 days before his examination. Therefore, we cannot say as a matter of law that a finding that the day affixed for the alleged abuse was wrong is clearly erroneous.

The Court does agree with Appellant, however, that there was error in the fact-finding process regarding statements of abuse made by child number 7. In her out-of-hearing statements, this child indicated that a pink or orange ball was put in her vagina. While pointing out that statements made by young children cannot be taken literally, the Hearing Examiner, in his revocation decision, postulates that the "ball" referred to by number 7, "could have, in fact, been the glans of a penis". Proposed Decision, page 36 - 37. A review of the record does not present evidence by which the Examiner could have reached this conclusion. Thus, the factual conclusion that the "ball" was actually the glans of a penis, was error. On remand, the Hearing Examiner is instructed to disregard the finding of fact in this respect, unless further proceedings would substantiate such a finding.

While recognizing Appellant's argument that the testimony of Dr. Donner was disregarded by the Examiner, we are reluctant to qualify the Examiner's findings as erroneous. Dr. Donner points out discrepancies between statements made by the children and their physical find-

ings. He testified that the therapist treating the children did not get histories and that their methods of treatment did not comport with what he felt to be the standard of care. Dr. Donner was also of the opinion that most of the children were manifesting symptoms consistent with separation anxieties. Yet the Hearing Examiner found the testimony of treating therapists and parents to be more credible than that of Dr. Donner. The fact that Mr. Clark chose not to accept Dr. Donner's testimony over the testimony of others is not error. He can accept or reject testimony and it is not the job of the reviewing court to act as fact-finder. *See* Standard of Review, *supra*. The fact that Dr. Donner's testimony was essentially disregarded because he had no contact with the children may be remedied by Part III of this Opinion.

CONCLUSION

Under Section 10-215 of the Administrative Procedure Act, the administrative decision must be reversed for the reasons previously discussed. The aforereferenced section also bestows upon the Court the authority to remand the matter for further proceedings. This seems most appropriate since the deficiencies previously discussed are matters that can and should be addressed by further hearing. Accordingly, the decision of the agency is REVERSED and REMANDED for further proceedings consistent with the Court's Memorandum Opinion.

Since the matter is being remanded, the question arises as to whether the facility should remain open during that process. Given the present level of private and public scrutiny now in place, the Court has no concern for the protection of the enrollees. At present there are Orders that require police inspection, limitation of males upon the premises, et cetera. When those requirements are combined with the fact that there have been no reports of abuse since the initial complaint and the high degree of public attention, the Court finds little likelihood of present

danger. Accordingly, the Court will order that Bo Peep may remain open pending further proceedings and adjudication.

ORDER

The Court having issued its Memorandum Opinion, it is this 9th day of March, 1989, by the Circuit Court for Harford County, ORDERED, that this matter be and is hereby REVERSED; and,

It is FURTHER ORDERED, that this matter is hereby REMANDED to the administrative agency for further proceedings consistent with the Court's Memorandum Opinion; and,

It is FURTHER ORDERED, that the Bo Peep facility may remain open, pending further proceedings and adjudication by the agency; and,

It is FURTHER ORDERED, that all presently in force Orders concerning police inspection, et cetera, shall remain in effect pending further proceedings and adjudication.

/s/ Maurice Baldwin
MAURICE W. BALDWIN, JR., Judge

APPENDIX C

IN THE MATTER OF
BO PEEP DAY NURSERY
REVOCATION AND DENIAL OF LICENSE RENEWAL

BEFORE THE
DEPARTMENTS OF HEALTH AND MENTAL HYGIENE
AND HUMAN RESOURCES

DHMH HEARING OFFICE DOCKET NO.: 88-M-028

FINAL DECISION

Pursuant to State Government Article, §10-214 of the Annotated Code of Maryland, and based upon the attached Proposed Decision in this matter issued by Chief Hearing Examiner William F. Clark, Esq., dated August 23, 1988, it is this 31st day of August, 1988, ORDERED that the Proposed Findings of Fact and the Proposed Conclusions of Law as stated therein are adopted as Final Findings of Fact and Final Conclusions of Law, and the decision of the Harford County Health Officer to permanently revoke and deny the application for re-licensure of the Bo Peep Day Nursery hereby is AFFIRMED.

/s/ Adele Wilzack	/s/ Ruth Massinga
Adele Wilzack, R.N., M.S.	Ruth Massinga, Secretary
Secretary, Department of Health and Mental Hygiene	Department of Human Resources

APPENDIX D

BEFORE A HEARING EXAMINER OF THE DEPARTMENT OF HEALTH AND MENTAL HYGIENE

HEARING OFFICE DOCKET NO.: 88-M-028

IN THE MATTER OF BO PEEP DAY CARE NURSERY REVOCATION AND DENIAL OF LICENSE RENEWAL

PROPOSED DECISION

SYNOPSIS OF CASE
FINDINGS OF FACT
CONCLUSIONS OF LAW AND RECOMMENDATION

SYNOPSIS OF CASE

The day care license issued by the Harford County Health Department to the Bo Peep Day Nursery was to expire on March 31, 1988, by operation of law, since such licenses are valid for one-year periods only. Prior to the expiration date, the licensee, Deborah Cassilly, requested renewal of her annual license. By letter dated March 26, 1988, the Health Officer for Harford County, Thomas M. Thomas, denied that request, stating as his reasons that continued operation of the day care nursery is not consistent with the statutory objectives contained in Health-General Article, Sections 14-102 and 14-104; the continued violation of COMAR 10.05.01, Regulations .12, .18, .49, .50A, .59, .60, .65 and .76; the belief that existing staff would not assure appropriate supervision of children; and the earlier findings of injurious treatment which reflected deficiencies in the management, staffing and operation of the center.

The licensee, by letter dated March 30, 1988 from her legal counsel, Thomas J. Peddicord, Jr., Esq., filed an appeal with the Office of Administrative Hearings and Appeals of the Department of Health and Mental Hygiene. The facility has remained in operation pending resolution of its appeal, pursuant to State Government Article, Section 10-404, Annotated Code of Maryland.

This matter was heard on May 11, 17, 18, 19, 27, 31, and June 1, 7 and 8, at various locations in and near Baltimore.

At the hearings, the State was represented by Assistant Attorneys General Lawrence H. Norton, Daniel J. O'Brien and, until the hearing of May 27, Roberta M. Ward. The licensee was represented throughout by Thomas G. Young, III, Esq., and Thomas J. Peddicord, Jr., Esq., both of the law firm Marlow, Peddicord and Young.

Motions for postponement, for broad discovery to include interviewing children involved with allegations of child abuse at Bo Peep, and for recusal of this Hearing Examiner, all filed by the Appellant, were denied on the record, however, certain limited discovery was permitted, in that the parties were to exchange documents, names of witnesses, their occupations, and a brief statement as to topics to be testified upon, 24 hours prior to being called to the stand. A request for a pre-hearing conference, received at the Office of Administrative Hearings and Appeals on May 10, 1988, was denied via telephone in view of the lateness of the request, being received in the morning prior to the scheduled first day of hearing.

A Motion to Intervene, filed by counsel for certain parents and family members of children who were formerly enrolled at Bo Peep, was denied on the record, after hearing argument.

FINDINGS OF FACT

The mother of Child #15 testified. Child #15 is approximately five years old, and was enrolled at Bo Peep from June, 1985 to July 15, 1987. Ms. Rita Blevins was the aide in her class during the first year, and was the teacher of her class in the second year. During the summer of 1987, Child #15 exhibited an extreme fearfulness, cried in despair, and had thrown temper tantrums. She would not sleep alone after leaving Bo Peep, and would not sleep in her own bed. In September, 1987, the child said to her mother, "Mom, will you lick my butt" and "Stick your finger in my mouth and I'll suck on it" and "I know how to suck on it and not bite it and I'll suck on it until the stuff comes out." When questioned by the mother where the child learned this, the child said that she did not want to talk about it. Child #15 expressed concern for other children at Bo Peep, and exhibited a fear of policemen. On seeing a police car parked outside of the Bo Peep facility, the child asked her mother if there had been another child hurt at Bo Peep.

In November, 1987, Child #15 showed to her mother how Ms. Rita had struck her at Bo Peep, by placing her flat hand on her chest, and then striking it with her other hand. Child #15 exhibited a propensity to lick people, and when queried about it by her mother, the child replied that Ms. Rita taught the children to lick each other everywhere. Child #15 also licked other people besides her mother, and when she kissed someone, she would try to stick her tongue in their mouth. On one occasion, Child #15 told the mother that she saw Ms. Rita without her underpants on with her private parts hanging out, and that Mr. Pat was "punching her in the stomach" at that time. As the child said this, she was hopping up and down on a punching bag. Child #15 also reported to her mother that Ms. Rita had struck her in the stomach, causing her to vomit. The mother recollected this occasion, which was

her own birthday, to be the day that she was called by the staff at Bo Peep to come pick up her daughter early, as staff there reported that the girl had a fever and was sick. The mother, who is a registered nurse, was unable to detect a temperature after she picked up the child. The mother recalled that the girl was very quiet and subdued, and that for the remainder of the day she was not sick again, and was able to go to the mother's birthday party later than day.

Child #15 exhibits a fear of all attics and has expressed a fear that policemen will take her away from her mother. Child #15 related to her mother that Ms. Rita had said that she (her mother) would be killed if Child #15 talked about Bo Peep. This occurred in the fall, 1987. On another occasion, while the mother and daughter were in a Chinese restaurant, the child, apparently seeing a customer who reminded her of Ms. Rita Blevins, expressed fearfulness if she were to see Ms. Rita in the restaurant, to such a degree that the mother took her from the restaurant. When Child #15 happened to see the licensee on a T.V. newscast, where the licensee was indicating that Bo Peep was a good place, and everybody was good there, Child #15 looked up and said "why is Ms. Debbie lying? She knows it is not a good place."

Child #15 entered psychotherapy on March, 1988. Child #15 had been examined by Dr. Charles Schubin on July 26, 1987, who found no obvious signs of abuse, and has been seen by Mary Derbyshire, L.C.S.W., twice, the last time being August, 1987. Child #15 has been as well to the Johns Hopkins University Hospital, and while there, exhibited a fearfulness of the hallways and of men.

As brought out on cross-examination, the mother of Child #15 separated from her husband in May, 1986, and they were divorced in December, 1987. From April, 1987, to approximately June, 1987, the mother had a concern regarding the custody of Child #15, in view of the impending

divorce, inasmuch as her husband was a foreign national, and was in fact out of the country from July until Labor Day of 1987. The child's behavior improved after Labor Day when her father returned to this country, and the child commented to her mother that she had been told at Bo Peep that her father was dead. Child #15 exhibited a fear of separation from her mother in early August, 1987. The mother reported that according to the analysis done at Johns Hopkins, her child's regression was caused by two factors, i.e., her being abused at Bo Peep, and the divorce which her parents were going through at the time.

In February, 1988, Child #15 began to express having dreams of robbers taking her away. Between the time that Child #15 left Bo Peep and started attending a new day care center in September, 1987, she stayed at residences of relatives, which residences housed males, i.e., a grandfather and an uncle. The child reported to her mother that when she was hit at Bo Peep by Ms. Rita, the other teachers were outside. Child #15 also reported to her mother that Ms. Debbie has hit other children at the facility, and mentioned Child #26 by name. The mother noted that her daughter had bruises up and down the front of her legs, and noted that they no longer appeared after the enrollment at Bo Peep ended. When the mother asked the child about how the bruises were caused, the child replied that she would not talk about it.

The mother reported that Child #15 said Bo Peep is a bad place with bad people, but that she would not elaborate on her remarks, which were made during the summer of 1987. The child reported to her mother that teachers at Bo Peep said that she was bad and ugly, and that God would not love her. Child #15 reported to her mother that she did not want to return to Bo Peep. On cross-examination, the mother of Child #15 stated that she did not tell the therapist at Johns Hopkins Hospital about the abuse at Bo Peep, and that staff at Hopkins determined that the girl's behaviors are consistent with being the vic-

tim of child abuse. Also on cross-examination, the mother indicated that Child #15 spoke to the Hopkins' therapists about a Mr. Pat who lived up in the top of Bo Peep. The licensee lived with her children and her husband, Patrick, on the third floor of Bo Peep until July 28, 1987.

Child #6 attended Bo Peep from June, 1986 until July, 1987. Her mother testified that Ms. Rita was in charge of the class for her daughter. The child reported that Ms. Rita is mean and that she said kids were bad, stupid, and dumb, and that she would yell at the children. The child related that if children were not good they would be hurt, and that Ms. Rita would pinch her or slap her on the arms and legs and would do so to other children as well, and mentioned specifically Children #25 and #26. The child related to her mother that Mr. Pat would hurt her, would pinch her and pinch her "twinkie," which is the term she gave to her vagina. The mother testified that the child told her Ms. Rita saw Mr. Pat both hurt other children and her, but did nothing about it. Child #6 related to her mother that she had been disrobed by Mr. Pat, that his clothes were off, and that Ms. Rita's top was off, and that she has "big boobies," and drew pictures reflecting her perceptions. Child #6 told her mother that Mr. Pat put a black stick in her and that sometimes it hurt, and that sometimes it did not hurt. The child related that it always happened during nap time. Child #6 exhibited a fear of going to bed at night at home. At her new day care facility, she would not take a nap with the other children during the daytime, and exhibited excessive masturbation. The mother noted that the masturbation started at Bo Peep in the fall of 1986 and progressed to the point that the child began to insert objects i.e., crayons or small toys, into her vagina. The child told her mother in the fall of 1987 and occasionally up until a few weeks prior to this hearing, that Mr. Pat had hurt her. Most of the hurting by Mr. Pat related by the child was to her vaginal area. Child #6 also related to her mother that she had to wear

dresses at Bo Peep, and could not wear pants. She was told by Mr. Pat that pants made her ugly and that a dress made her pretty, as related in a conversation between the mother and Child #6 in October, 1987. From the period of approximately the middle of August, 1986, the child was noticed by the mother to have a redness in her vaginal area. The pediatrician who examined the child advised the mother to stop bathing the girl with "Mr. Bubble," to dilute her fruit drinks, and to change the detergent for the laundry, however, the redness still was a problem until late March, 1987. The child refused to sit in the bath tub and complained that her "twinkie" hurt. The child cried from the pain, and declined to urinate, stating that it was painful. Tests run by the pediatrician were unable to determine a cause for the child's problems. In April, 1987, the redness went away and her behavior changed, in that she was not as insistent on wearing dresses to Bo Peep. Child #6 told her mother that she had been told that Mr. Pat knows where she lives and that if she ever told he would chop her up and put her down a drain. As observed by the mother, the child drew Ms. Rita with no shirt on at nap time, and drew her as being in jail. While drawing Ms. Rita, the child tried to stick herself in the vagina with crayons or magic markers. The child exhibited signs of regression and baby talk and was "hyper." At a session with her therapist, the child fell down to the floor in a fetal position, was slapping her leg stating "no more, Mr. Pat" and "Mr. Pat's a bad man. I hate Mr. Pat. I hate my mommy." The child's mother was called into the session by the therapist to assist in comforting the child and to help bring her out of this regressed state. Also on direct examination, the mother related that the child expressed a disinclination to attend Bo Peep saying, "Do I have to go to school tomorrow?" This child was seen by Dr. Schubin, who found her to have a 30% fusion of her labia minora. His clinical impression, as reported at the 1987

proceeding, was that this child had suffered repeated sexual injury.

On cross-examination, the mother of Child #6, who is divorced, admitted that she has dated men, but denied that they have had the opportunity to be alone with her daughter. The mother's ex-husband lives west of the Mississippi. The mother and Child #6 live with the mother's parents. During the fall of 1986 through the first part of 1987, the child exhibited aggressiveness toward her grandfather, and would refuse to leave Bo Peep with him on some occasions when he arrived to pick her up at the end of the school day.

The child stopped masturbating near the end of March, 1987, about when the redness of her vagina cleared up. At that time, the mother noted that Child #6 had little pink dots on her body, which the mother took to be pinch marks or "hickeys." The child reported to the mother that other children would pinch her at Bo Peep. At a meeting of Bo Peep parents called in June, 1987 by the Department of Social Services, and at which a list of symptoms characteristic of children who had been sexually abused was handed out, Child #6 was determined by the mother to exhibit almost all of those symptoms. Child #6, as reported in the previous administrative hearing, and as repeated here, told her mother that Mr. Pat "pinches my cheek and scratches my hiney," and in a therapy session on July 16, 1987, showed aggression toward a baby doll in its sexual areas. The child related to her mother that none of her "teachers" ever touched her in her private areas. However, the child did not consider Mr. Pat to be a "teacher."

Mary Derbyshire, a licensed certified social worker, was admitted as an expert in the field of social work, with a specialization in the treatment and evaluation of children who had been subjected to physical and sexual abuse. Ms. Derbyshire indicated that the only change that she had in

her testimony from when she testified at the 1987 administrative hearing on Bo Peep, is that she has now concluded, in her professional opinion, Child #8, a former Bo Peep student, does not manifest behaviors and verbalizations consistent with child sexual abuse.

Ms. Derbyshire has continued to see Child #6 since the last hearing. During a session with Child #6, the child drew a picture at Ms. Derbyshire's request, to explain what was making her feel so sad. The drawing, according to the child, was of Mr. Pat's leg and her "twinkie." The "leg" drawn by the child clearly represents an erect penis. When Ms. Derbyshire asked the girl what is her "twinkie," the girl pointed to her vagina. She referred Child #6 to an art therapist, because she determined it was easier for this child to express on paper rather than verbally, those things which she did not understand. During the sessions with Ms. Derbyshire, the child engaged in repetitive play, hiding "the bad men" in the trash can, and then telling the toy animals "they can't get to you now, it's O.K., they can't hurt you now." When queried by Ms. Derbyshire if anyone anywhere else hurt her, the child replied "no," only at Bo Peep. The child questioned Ms. Derbyshire if her grandmother and grandfather knew that she was being hurt at Bo Peep when they were taking her to and from that day care facility. It was Ms. Derbyshire's opinion that Child #6 evidences signs and symptoms consistent with physical and sexual abuse, and that based on the verbalizations from the child, the child's behavior that she personally witnessed in her office as well as information provided by the family and reports of the child's behavior and verbalizations witnessed by the family, that the trauma occurred at Bo Peep.

Mr. Derbyshire also has been providing therapy to Child #7 and has had weekly treatment sessions with her from September, 1987 up through the dates of this hearing. The child related to Ms. Derbyshire that Bo Peep was a bad place, and that Ms. Rita had hurt her scar from a hernia

operation by digging into it with her finger and making it bleed. The child also related to the therapist that Ms. Rita had beaten her in her vaginal area when she was going to the bathroom at Bo Peep. During another session, Child #7 said "they hurt me when I was in Bo Peep" and then she said "I was just kidding." The child similarly said she was "just kidding" after relating that Ms. Rita had beaten her on her pubic area. Ms. Derbyshire characterized this retraction as a defense mechanism which a child might use to protect herself from repercussions of disclosures of abuse. The child related that at nap time, Mr. Pat came in and woke her up and that Ms. Rita was there. She said that "Mr. Pat didn't know he hurt me because he didn't want to be a bad person." The child's emotional state as she made these disclosures was that she appeared terrified and was in an agitated state, shaking, pulling on her clothes, and was blanched.

During therapy sessions with Ms. Derbyshire, Child #7 acted out a game in which monkeys were dunked in water, they struggled, they were laid neatly on a tissue, and they were methodically dried off with another tissue. The child had Ms. Derbyshire play the role of Ms. Rita and say things such as "you are trapped, you are not getting out, I told you that you are not getting out of there, stay there," as the girl pushed the monkeys under the water. The child would play Mr. Pat, and she would get one of the monkey figures and say, "you can come out now; you can come out of the water," and as Mr. Pat, she would lay the monkey down on the tissue and very softly dry the monkey figures off one at a time with another tissue, and line them up in a very methodical kind of way. Child #7 indicated during the session that the children involved in this water game would be laid on a kitchen table at Bo Peep by Mr. Pat. This game theme was repeated at most of the therapy sessions that Ms. Derbyshire had with Child #7. The child also during the sessions expressed a fear of a creature she called "Big Foot" and also expressed

a fear of firemen and policemen, and a fear of a "water machine," which activity involved Ms. Rita and Bo Peep's attic. Ms. Derbyshire characterized the child as sobbing, shaking, wringing her hands, and occasionally masturbating during the time she was talking about things related to Bo Peep. The child related occasions where Mr. Pat put his hands around her neck and tried to choke her while she was sleeping at Bo Peep. The child also related to Ms. Derbyshire that Mr. Pat had gone to the basement to get a rope, and that at that time Ms. Rita had a "scary look." In March, 1988, Child #7 described to Ms. Derbyshire how Mr. Pat would put the rope around her neck and choke her. The child also related to Ms. Derbyshire that Ms. Rita and Mr. Pat had hurt Child #29, and also indicated that Ms. Rita had hurt that child by scratching on her arm. Child #7 related during the session that Ms Rita had beaten her on her belly by laying her palm on the child's stomach area and then hitting the back of her hand repeatedly, very hard. Ms. Derbyshire characterized this as a technique of beating a child without leaving a bruise. The child related to the therapist that Mr. Pat likes her to wear dresses, and that Ms. Rita had said to her that if she ever told secrets, she would be taken away on a bus. The child related that Ms. Rita would pick scabs on her until they bled. Child #7 also indicated that Ms. Rita hurt Child #30 by beating her in the stomach, and that Child #30 tried to get away but Ms. Rita said "stay up here because I want to hurt you," and that Ms. Rita made the kids stay up on the table.

Ms. Derbyshire gave her professional opinion that Child #7 has symptoms consistent with sexual child abuse, and based on her clinical training and experience, her professional opinion within a reasonable degree of certainty, is that this physical and sexual abuse occurred at Bo Peep.

Ms. Derbyshire also saw Child #3, beginning treatment on May 6, 1988. As of the date of the hearing, Ms. Derbyshire had not yet obtained a detailed family history for this child. Child #3 related to Ms. Derbyshire that Mr. Pat

and another person touched Child #2 in her "butt," and that Mr. Pat put his hands on the "butt" of child #4. Due to these and other comments and observations which Ms. Derbyshire made, her professional opinion as that Child #3 did have the signs and symptomology of sexual abuse, which in her opinion occurred at Bo Peep. Despite not having a detailed history of Child #3, Ms. Derbyshire felt that she was able to opine on the cause for the girl's manifestations, based on the contact she had with Child #3, and on the reports given to her by the mother of Child #3.

Esther Dienstag, Ph.D., is a licensed psychologist who was admitted in this proceeding as an expert in developmental and clinical psychology, and in the investigation and evaluation of child sexual abuse. Dr. Dienstag treated Children 1, 2, and 4, all of whom were former enrollees at the Bo Peep Day Nursery. Her treatment of Children 1 and 2 encompassed the period of May 17, 1987 through November of 1987 and her treatment of Child #4 began in October of 1987 and continued through the date of these proceedings. Child #4 was referred to her for treatment by Mary Derbyshire. Dr. Dienstag had seen Child #4 twenty-two times as of the date that she testified at this hearing. Dr. Dienstag related that Child #4 has named a "Patrick", an adult, as hurting the children and pinching them at Bo Peep. Child #4 has related to Dr. Dienstag that Child #3 was touched by Patrick in her crotch area. Child #4 indicated that Patrick pinched Child #3 on her "butt" and on her privates. Child #4 related to Dr. Dienstag that she had to go upstairs with Mr. Pat and "Aunt Martha" because she was climbing on trees. Child #4 also related that both Mr. Pat and Ms. Debbie touched her and hurt her with "something that you can cut with like a knife," and a spoon, in the downstairs bathroom. The area in which she was touched was in her crotch area. The child related to Dr. Dienstag that Ms. Debbie told her that she, Ms. Debbie, would kill the child's mother. The child

related that Mr. Pat and Ms. Debbie touched her with a "sharp, sharp stick," in her crotch area. This occurred in the bathroom, and they took turns. The child said she hollered for help, but nobody came. The child indicated that she had been playing outside and she was called inside to go to the bathroom, and the two of them came in. In reference to the time that the child was punished for climbing on a tree, the child told Dr. Dienstag she had to go upstairs to Ms. Debbie's room where she lived and get punished, then she was made to go outside and sit on a bench. During these sessions, the girl had a theme of play which she repeated, involving a wolf figure hurting a girl figure by coming up from behind and biting her. Dr. Dienstag indicated that the child exhibited behaviors of refusing to sleep in her own bed; being frightened to go to the bathroom; she was opositional and couldn't be disciplined; she was engaging in excessive masturbation; she was exhibiting cruelty to animals; she was exhibiting low self-esteem; and she was wetting her pants. The child never wet her pants anywhere else except Bo Peep, where it occurred two to three times daily, but did occasionally wet her bed at night while sleeping. The child also had a sore and red-looking vaginal area, and the child complained of her "butt" hurting. Child #4 also worried excessively about people dying and wondered who would take care of her if her parents died. The child also showed an excessive fear of thunderstorms and fire whistles,, and she was inappropriately reaching for her mother's breasts and her grandmother's breasts. Dr. Dienstag also testified that there were times when Child #4 also reached for Dr. Dienstag's chest area. She gave her professional opinion that Child #4 has been the victim of sexual abuse and her opinion is that the abuse took place at the Bo Peep Day Nursery. She also opined that Child #4 has been the victim of physical abuse which occurred at Bo Peep.

On cross-examination, in being questioned about the extent of the history she had taken of the family of Child

#4, Dr. Dienstag admitted that she was not aware that the father had recently been cited for driving while intoxicated, although she did know that alcohol abuse was a factor in the child's home.

Child #33 is a boy who went to Bo Peep from the Autumn of 1985 until May or June of 1986, during which period he was between $4^1/_2$ to $5^1/_2$ years old. The mother of Child #33 testified at these proceedings that one morning, #33 had resisted going to Bo Peep, and claimed that Mr. Pat had beaten him. At the time, the mother expressed her thought that this was ludicrous, and the boy thereupon recanted his statement. In the summer of 1987, the mother asked the boy if he liked it when he went to Bo Peep, and he replied "no, they were mean," that he didn't like it there and didn't want to go back. He declined to continue that line of conversation. Approximately 3 weeks prior to this hearing, the mother of Child #33, in playing with him to get him up for school one morning, grabbed him through the bedcovers on his posterior. To her surprise, the boy became very upset and said "Don't ever touch me there again. That's where Mr. Patrick touched me and I don't like it." When she questioned the boy as to why he said this, and after an initial steadfast refusal of the child to explain, he told her that one time he was in Ms. Martha's class and that he was bad. He stated that Ms. Martha had gone and gotten Mr. Patrick, and that Mr. Patrick took him upstairs to the bathroom where Mr. Patrick pulled down the boy's pants and underwear, and that Mr. Pat spanked him a couple of times. Mr. Patrick then rubbed the boy's bare bottom and took him back down stairs to class. When the mother challenged that as not being the truth, saying that Ms. Debbie would never let Mr. Patrick do that, the boy replied that Ms. Debbie did know it, she was in the bedroom at the time. The boy told his mother that the spanking by Mr. Pat occurred upstairs where the Cassillys lived. The mother reported this incident to the Department of Social Services

and the boy was interviewed by an investigating police officer, to whom he repeated his story. The boy indicated to the investigators that when he had been taken upstairs, and taken to the bathroom, he could see the bedroom from the bathroom and that Ms. Debbie was there. The boy told the investigators that other children had been spanked, although he said he did not see it, he had only been so told by other boys that they had been spanked. The boy made an indication with his fist to the investigators with the thumb of his hand up, moving his hand up and down in the air, indicating that Mr. Pat had done this to the boys. On physical examination of the boy by a physician, no physical evidence of abuse was found.

On cross-examination, the mother of Child #33 indicated that there were some deaths in the family in 1987, i.e., a grandmother and a sister-in-law both died in June of 1987. The mother divorced from the boy's father in 1982.

Catherine Brown, a child development specialist with the Harford County Health Department, also testified. According to the staffing pattern which was received by the Health Department on February 9, 1988, Deborah Cassilly, the licensee, was scheduled to be at the facility approximately 3.5 hours of the 11.5 hours daily that the facility was open to care for children. She was scheduled to be at the facility for an hour in the morning, from 7:45 to 8:45, and then to return to the facility from 3:30 p.m., until closing at 6:00 p.m. Ms. Brown testified that two visits were made to Bo Peep in 1988, one on Tuesday, April 26, 1988, and the other on Friday, May 6, 1988. Nothing untoward was found, although these were not "inspection" visits, but were made to check on the child attendees and the nursery's staffing. According to Ms. Brown, Rita Blevins appears to be in charge of the facility in Ms. Cassilly's absence, and she is the only senior staff there sometimes. On cross-examination, Ms. Brown testified that she was told by her superiors in the Harford

County Health Department not to perform an inspection of the Bo Peep facility.

The staffing pattern submitted in conjunction with the renewal application indicates that Rita Blevins is on duty from 7:30 a.m. to 4:30 p.m., and after Deborah Cassilly leaves at 8:45, Rita is the only group leader and senior staff member until Maureen Baxter arrives at 11:30 a.m.

Deborah Cassilly testified that neither she, nor her husband, nor Ms. Rita, nor any other staff ever struck or abused a child at Bo Peep. She stated her opinion that staff do not have the opportunity to feel that they are ever alone with a child.

Ms. Cassilly testified that Child #15 did not exhibit any desire to leave quickly from Bo Peep at the end of the school day. She did not recall Child #15 having to leave Bo Peep in March of 1987 as a result of being ill with a fever and vomiting.

She testified that her observation of Child #6 was that this young girl refused to go home from Bo Peep with her grandfather, although she did not appear to have a problem leaving Bo Peep with either her grandmother or her mother. She recalls that #6 is a cute child who had a personal preference of wearing dresses.

Regarding Child #3, Ms. Cassilly testified that this young girl was aggressive, and would be observed pushing and pinching other children at Bo Peep. She denied ever noticing bruises on the child, but testified that she heard the mother say to the child "I'm going to spank you when we get home", on occasions where the child would get in trouble at Bo Peep. She testified that #3 never expressed a fear of any person, and that Child #3 did require discipline at Bo Peep, which was handled only by having her sit in the kitchen with a staff member for a short period of time.

Regarding #7, Ms. Cassilly indicated that this child exhibited no fear of nap time and was a good sleeper at Bo Peep, sleeping the entire two hours of scheduled nap time. Ms. Cassilly recalled a July, 1987 conversation with the mother of Child #7, to the effect that the mother felt certain that there was no problem regarding her daughter and Bo Peep, although at the present time the mother does feel that sexual abuse did occur to her daughter at Bo Peep. Ms. Cassilly denied that anyone at Bo Peep ever harmed Child #7. Ms. Cassilly did not recall ever having to discipline Child #7.

Ms. Cassilly denied that Child #33 ever go hurt, or harmed, or struck at Bo Peep, either by herelf or by Patrick Cassilly, or by any of the Bo Peep staff. Ms. Cassilly testified that since the apartment on the third floor of Bo Peep has been vacated by her family, the area has been kept locked, with the key being kept on the first floor. Since September of 1987, the Bo Peep facility has had its front door locked during daytime hours, and a sign posted there directs visitors to a side entrance. Also an alarm for the door has been installed, which sounds when the door is opened.

Ms. Cassilly feels that the events as alleged could not have occurred at Bo Peep, since the facility allows parents to come at anytime during the day, although there is no written policy existing to that effect. In response to questioning on cross-examination, Ms. Cassilly stated that repeated injuries to children at a day care facility is an important element, but should not necessarily result in a license being denied. She also indicated that she does not feel that a director of a day care facility has any more important role than staff of the facility. Ms. Cassilly further testified that Rita Blevins is in charge of the Bo Peep facility from 8:30 a.m. to 11:30 a.m. if she herself is not in attendance.

The mother of Child #26 testified on behalf of the Appellant. Child #26 attended Bo Peep from June of 1986 to July of 1987, and during that time, her teacher was Rita and the Aide was Terri. She testified that the only symptoms of child sexual abuse that she recalls being mentioned at the Department of Social Services meeting in June of 1987 were bed wetting and sleeplessness. This mother testified that she felt the Department of Social Services meeting did not go into detail about the allegations of child abuse at Bo Peep, and she thought that the meeting was basically a waste of time. Her recollections on visiting Bo Peep were that the children were always supervised, even in the bathroom. She testified that her child was always positive and upbeat on being questioned regarding Bo Peep, and due to the child's outgoing personality, the mother did not believe that any abusive situations occurred to her child, as alleged by Children #15 and #6, or to other children of Bo Peep. She indicated that Child #26 loves Rita, and on recent occasions they both visited Deborah Cassilly and Bo Peep. She indicated that her child expresses no fear of Bo Peep or of any staff members, and she believes the facility offers an excellent quality of service. She stated that her child has not indicated that she was harmed by Patrick Cassilly, nor that any other children had been harmed at Bo Peep. She indicated that she had free access to the facility, and that when she did arrive at an unusual hour, i.e., other than the normal pick-up or delivery times of her child, she noticed no unusual circumstances at the facility. On cross-examination, she admitted that if she did to go Bo Peep at other than the usual pick-up and delivery times, she would usually notify the Bo Peep staff in advance of her impending arrival. She has not taken her child for a physical examination to determine if she had been sexually abused. Likewise, this parent has never taken her daughter

to a psychologist or psychiatrist or a child abuse specialist for evaluation as to her possibly having been sexually abused.

The mother of Child #25 also testified on behalf of the Appellant. Her daughter has attended Bo Peep since the Spring of 1986, has Rita as a teacher, and her daughter is still attending Bo Peep. This mother has gone to Bo Peep approximately two times a month, mostly unannounced, and had not observed any suspicious activities. Although her child was identified by other children as having been victimized at Bo Peep, she has declined to have her child examined either by medical or psychological professionals. She had initially scheduled a physical examination with Dr. Schubin, who had examined a number of other children in this case, but cancelled that appointment because she felt that she was pressured by him to make the appointment, and she feels that he is prejudiced against day care facilities. This mother indicated she was confident that her child would reveal it to her if any harm had occurred to her at Bo Peep, and that she would be able to tell if her child was unhappy. As of the date of the hearing, this parent as well had not had either a doctor or a therapist evaluate her daughter for sexual abuse.

The father of Child #29, a five-year-old as of January 1988, and who attended Bo Peep from September of 1986 through June, 1987, testified on behalf of the Appellant that he had been disappointed and frustrated with the lack of details which were revealed at the meeting conducted by the Department of Social Services in June of 1987. He testified that he questioned his daughter about the happenings at Bo Peep, and never received any indication that anything was wrong. Child #29 was taken to her pediatrician by her parent, and there was no physical evidence of abuse found by this doctor. The father testified that he had free access to the facility, although he generally tried to notify Bo Peep staff in advance of his early retrieval of his daughter. His daughter exhibited no fear of Rita,

nor did his daughter indicate that any harm had befallen her from Deborah Cassilly, Patrick Cassilly or at the hands of anyone else at Bo Peep. To his knowledge, the only punishment that was meted out to the children at Bo Peep was for them to be isolated in a chair at the facility. His daughter did not indicate an awareness as to any other children being harmed at Bo Peep, and feels that the quality of service at Bo Peep is excellent, and stated that he would send his infant son to Bo Peep when he was old enough. On cross-examination, he testified that his pediatrician, on examining Child #29, did not mention that some abuse as may have occurred might not show up physically. Child #29 was not taken to a therapist for evaluation.

Lawrence Donner, Ph.D., testified for the Appellant. Dr. Donner has been in the private general practice of clinical psychology since January of 1984 and specializes in human sexuality. He is a licensed psychologist. He was formerly an Associate Professor at the University of Maryland School of Medicine. Dr. Donner evaluates, but does not treat, children for sexual abuse. He estimated that he has seen about four preschool children since January of 1984 for either neglect, physical abuse, or sexual abuse. He has not evaluated any children who were abused in a day care center. He has not treated any children for sex abuse, and does not generally treat children. Dr. Donner was accepted in these proceedings as an expert witness in the field of clinical psychology. Prior to testifying at this proceeding, Dr. Donner reviewed the 1988 testimony given at these proceedings of the parents of Children #6, #15, #25, #26, #29, and #33, and reviewed as well the 1988 testimony of Mary Derbyshire and Dr. Dienstag. In addition, he reviewed the transcript of the testimony from 1987 from the parents of Children #1 and #2, as well as the testimony of Dr. Schubin, Ms. Derbyshire, Barbara Mitchell, and Dr. Spodak. He also researched articles on the subject of child sexual abuse.

Dr. Donner took issue with the performance of the professionals who testified for the State in this proceeding, indicating that they took little or no history of several of the children. In respect to several reports made by the children which the State's witnesses interpreted to reflect sexual victimization, Dr. Donner testified that the statements were misinterpreted. Dr. Donner concluded, for example, that language of Child #1, reported at the 1987 proceedings, to the effect "Don't be afraid, close your eyes, I'm touching your private parts" reflects merely the normal sexual curiosity of three- to four-year-olds who share a bathroom and are curious about each other's genitals. Based on his review of the transcripts, Dr. Donner believed that Child #1 displayed the symptoms of separation anxiety. He testified the parent of Child #1 was leading Children #1 and #2 in questioning them. He felt that the child's story was not credible, when the child claimed to have been bitten in the "tushy," because no bite or physical marks were observed. He pointed out that his review of the transcript failed to find any reference to blood being found in the underpants of Child #1, and he felt that the anal penetration injury exhibited by Child #1 was consistent with the child possibly being hurt by a gymnastics bar, since the child took gymnastics lessons. He attributed the child's fear of bathrooms to her reported constipation and vaginal infections. He found the child's physical injuries to be inconsistent with her statement that she bled from her knee, and he questioned how, if the child was "bitten" from behind, the child could say she saw that her assailant had his pants down and saw his belly button. His review of Dr. Dienstag's testimony and of the parents' testimony found the children's symptomology to be not inconsistent with the separation anxiety disorder. Dr. Donner believes that the parents led their children into making these allegations, and that the children who made the allegations came from stressed families with economic, or physical, or emotional afflictions. The

fear of some children that their heads will be chopped off, he said, is also consistent with his diagnosis of separation anxiety.

Dr. Donner testified that discussions with Child #3 were such that the child was interrogated constantly and was told about things repeatedly, leading the child not to give spontaneous replies, and calling into question the veracity of the child's statements. Dr. Donner gave the opinion that Child #3 is suffering from a separation anxiety disorder too, and that there was nothing inconsistent in Ms.. Derbyshire's testimony, Dr. Reichel's testimony or the file cards assembled by Ms. Derbyshire which would be inconsistent with his stated opinion.

Regarding Child #7, Dr. Donner testified that in his opinion this child was experiencing considerable stress and anxiety, not due to being sexually abused, but due to the stressors existing at home with her parents and in the therapy encounters that she was undergoing as a result of these allegations. His opinion is that Child #7 displays psychological symptoms consistent with a diagnosis of separation anxiety.

Regarding Child #6, Dr. Donner indicated in testimony that the fusion of her labia could have come from self masturbation, and since the testimony of the mother of Child #6 indicated that the child did masturbate, he believed that this physical condition did not necessarily indicate sexual abuse. Dr. Donner also indicated in testimony that the mother of Child #6 continually questioned the child regarding Bo Peep, and in doing so, led her by those questions, and elicited responses which were not necessarily valid. In Dr. Donner's opinion, Child #6 is suffering from separation anxiety as a result of being exposed to repeated questioning about Bo Peep and due to stressors in her home life.

Regarding Child #4, Dr. Donner challenged the opinion of Dr. Dienstag that this child suffered from child sexual

abuse. He indicated that finding symptoms consistent with sexual abuse does not mean that, in fact, sexual abuse has occurred. He suggested that the 12 mm opening of this child's hymen versus a normal 4 or 5 mm opening could be explained by the fact that this child had a history of masturbating. He also found a conflict between the statement of the mother that the child wet herself only while at Bo Peep, yet on the other hand she indicated that the child wet her bed at night while sleeping. He also faulted Dr. Dienstag for not having an extensive history about the family life of Child #4, and stated that Dr. Dienstag's opinion was not credible, since she did not have a fuller knowledge of the child's home situation, which environment could give alternative explanations for the child's symptoms.

Regarding Child #15, Dr. Donner expressed the opinion that this child also suffers from separation anxiety syndrome. He attributed her vomiting at Bo Peep to the fact that the child was anxious about her mother's birthday party. He found that this child was suffering from stress, since her parents had undergone a divorce and there was some fear of the father, a foreign national, possibly taking her to his native country. He noted that a number of the fears expressed by this child occurred after she quit attending Bo Peep, and that the child's statement to her mother about wanting to suck on her finger until the juice came out, in fact reflects a recent sexual activity, but he places it as occurring after Labor Day of 1987, a period of time when the child was not enrolled at Bo Peep.

Dr. Donner gave the opinion at this hearing that the descriptions of Children #1, #3, #4, #6 and #7 of abuse allegedly suffered at Bo Peep, are not credible to him as a clinician. He opined that the evaluation and treatment by Ms. Derbyshire and Dr. Dienstag do not meet the reasonable and customary care standards normally administered by psychologists and clinicians, and his opinion was that Children #1, #3, #4, #6 and #7 display symptoms con-

sistent with separation anxiety, the cause of which he attributed to their being under extreme stress as a result of this investigation and the way it was handled. He gave his opinion that Children #1, #3, #4, #6, #7 and #15 had not suffered psychological abuse at Bo Peep nor have they suffered physical or sexual abuse there.

On cross-examination, Dr. Donner admitted that he was unaware of Dr. Schubin's standing and his experience in the field of child sexual abuse, and indicated his unawareness of Dr. Schubin's being the Chairman of the Governor's Commission on Child Abuse. Dr. Donner did not review the medical records made by Dr. Schubin nor by Dr. Reichel of these children, nor had he spoken to either Dr. Schubin or Dr. Reichel in regard to their examinations of the children in question. Dr. Donner did not take detailed histories or talk to the children or parents or do any testing of the children who were involved in these proceedings, nor did he speak to Ms. Derbyshire or Dr. Dienstag or to any other therapist to interview them regarding their findings and conclusions in regard to these children. Similarly, Dr. Donner did not interview Deborah Cassilly or Patrick Cassilly or take a family history from them, nor did he talk to Rita Blevins nor take a family history of her, and indicated that he was unaware that she had an adolescent child who was alleged to be possibly involved in sexual misconduct at Bo Peep. He has not visited Bo Peep, and has not spoken to any personnel from the Departments of Health or Social Services in Harford County. He was not aware of the requirement of the law that a therapist report their suspicions of child abuse within 48 hours to appropriate law enforcement authorities.

In response to a question posed by this Hearing Examiner, Dr. Donner expressed his opinion that some objective indicia of child sexual abuse would be gonorrhea, observations made by an adult, confessions of a perpetrator, or samples of semen taken from a child. None of these,

he testified, are present in any of the cases of children from Bo Peep.

In addition to the factual dispute between the parties about whether injurious treatment occurred to children enrolled in Bo Peep, the Appellant also raised three issues in support of its motion to dismiss these proceedings. The Appellant first argues that the Department did not conduct an inspection required pursuant to COMAR 10.05.01.07 before denying the renewal application. Secondly, the Appellant argues that the decision not to renew the day care license for Bo Peep was improperly delegated by the Harford County Health Officer to a Hearing Examiner of the Department of Health and Mental Hygiene, in that the Health Officer based his decision not to renew the license on the decision of the Hearing Examiner from last year's administrative proceedings, #87-M-105. The Appellant notes that the Department's decision emanating from that hearing has been stayed by the Harford County Circuit Court, and consequently, she argues it is improper to use that decision as a basis upon which to deny the renewal application. Finally, the Appellant contends that the Department needs current information upon which to make its decision not to renew the license. The Appellant argues that the State at this administrative hearing is using evidence and material and information all of which pertains to incidents which were alleged to have happened during the previous licensure year, i.e., prior to the March 31, 1988 expiration of the most recent license.

In response, the State argues that while it is true that the previous administrative decision regarding this licensee has been stayed upon order of the Harford County Circuit Court, for all intents and purposes that decision is a final administrative decision, in respect to any other disciplinary action taken by this Department, and that the licensee's suspension record, coupled with the testimony and evidence and findings of the previous administrative hearing, is enough to justify the decision of the Health Department

not to renew the licensee's request for continued operation of her day care facility. The State also argues that, in fact, new evidence has been presented at the current proceedings, and that information, as conveyed by the witnesses, has been appearing as recently as two or three weeks prior to the hearing date. The State argues that it needs only to show mistreatment by staff or any facility individual, such as a person living in the household where the center is licensed, to prove a violation of COMAR 10.05.01.46. The State argues that the failure to reinspect the facility is irrelevant, as the courts have recognized the authority of state agencies to deviate from its procedural regulations when it can be shown that the party regulated is differently situated than those to whom the regulation is intended to be applied. The State contends that reinspection of the Bo Peep facility would not alter in any way the findings and conclusions reached in the administrative hearing of last year, and consequently, the failure to reinspect was, and is, irrelevant. The State added that nothing could have been revealed on a reinspection of the facility's physical plant to negate the findings and conclusions regarding physical and sexual abuse having occurred at Bo Peep, and those findings and conclusions should not be ignored at the risk of children's safety.

CONCLUSIONS OF LAW

Regarding the issue of physical and sexual abuse of children having occurred at the Bo Peep facility, it is concluded that the preponderance of the testimony and evidence presented at this administrative hearing confirms the likelihood of those events, and supports the position of the Harford County Health Officer. The testimony of the therapists and the parents is compelling, and substantiates the bases used by the Health Officer in denying relicensure. In weighing the testimony of the State's witnesses and the Appellant's witnesses, it is concluded that the evidence clearly shows that the license should not be

renewed, based upon the mistreatment of children at the Bo Peep facility. A careful reading of the entire record in this case quite clearly shows that it is improbable for the events not to have occurred substantially as related by the children to their parents and to their therapists. The verbalizations, drawings, and the emotions of the children, as observed by their parents and by trained and licensed professionals, and the physical evidence as found by Dr. Reichel and Dr. Schubin, have not been refuted or shown to be erroneous or misinterpreted.

While the charge of injurious treatment of children is certainly a horrendous one, the facts adduced in this case clearly comport to information and data reported in the national study on child abuse in day care centers conducted by the Family Research Laboratory of the University of New Hampshire, State's Exhibits 36A and B. An overview of this report is contained in the attached Appendix. The New Hampshire Report does not, of course, prove that the events alleged at Bo Peep in fact occurred; however, that report does provide a reference point to which these allegations can be compared, and the similarities are indeed striking. This is particularly so, considering the fact that the New Hampshire Report was not issued until March of 1988, well after the initial reports of the abuse at Bo Peep surfaced. The New Hampshire Report reflects that abuse of children at day care centers can and does occur in similar circumstances as exist at Bo Peep.

There are similar themes, fears, and complaints which recur among the various children in describing their experiences at Bo Peep. There has not been any evidence whatsoever to indicate that these children have been in a position to collaborate with each other in making their allegations. It is unlikely that these similarities are happenstance. The contention that the significantly enlarged hymenal openings of the children could have been caused by their self masturbation is specifically rejected, as there is no support for such a conclusion in the record, and the

medical testimony from the previous hearing indicates otherwise.

While the Appellant's contention that a more detailed history could have been taken of the complaining children and of their families is true, nevertheless the information gathered and the observations made by these licensed therapists who testified about their sessions with the children is more credible than the expert opinion offered by the Appellant's witness, who merely read a cold record.

The expert testimony offered on behalf of the licensee by Dr. Donner cannot be considered persuasive or even helpful. Dr. Donner has extremely limited, almost nonexistent, experience in dealing with child sexual abuse, and given the additional facts that he did not speak with any of the examining professionals, did not review any of the medical reports compiled by the physicians, and only reviewed the record in this administrative proceeding, all quite clearly tend to negate the credence of his hypotheses regarding these children and their symptoms. The testimony and the exhibits entered into this case clearly reflect that separation anxiety can be a manifestation of child sexual abuse. It would therefore be expected that sexually abused children would exhibit symptoms of separation anxiety, and therefore it is specifically rejected that these children manifested their symptoms solely as a result of being away from their parents and as a result of being subjected to the stressors described by Dr. Donner.

A close reading of the testimony and opinions offered by the Appellant's expert reflects that he, in addition to himself not having a history of the children at issue, misconstrued many of the statements in the transcripts which were relied upon in giving his opinion that the children were led and harassed by their questioners. Much of the opinion offered was that a fact finder, as opposed to that of a clinician in psychology. His expert opinion must also be discounted because he has not given sufficient consid-

eration to the fact that the statements of the children cannot uniformly be taken literally, but must be interpreted in light of the children's perceptions and developmental levels, given the fact that these children, on account of their young age, do not possess the experience, mental capacity or vocabulary to efficiently and accurately convey their observations like adults do. An example is where he felt that the statement of Child #1, that she saw blood come from her knee, was inconsistent with the injury to her vaginal area. This statement by the girl could quite possibly result from the child having blood drip on her knee from her vaginal area. If the child only saw where the blood landed and not the area from which it came, a child of that age would quite naturally believe that she was bleeding from her knee. Similarly, he found inconsistent, and thus flawed, the statement of Child #7, who first said a pink ball, then said an orange ball, was put in her vagina. I conclude that it's likely that the child was trying to describe a flesh color, given the context of her statement. This expert witness also characterized the size of the ball as three inches in diameter, but the record reflects only that the child indicated with her fingers, its size. Obviously, an adult has a larger hand, and one must recognize, the resulting difference. The pink/orange "ball" described by the girl, given her age and developmental level, could have, in fact, been the glans of a penis. The literature in the area of child abuse quite clearly specifies that children have to rely on terms with which they're familiar.

The claim that Ms. Derbyshire was withholding information and would not provide it, that she has withheld information that would give a fuller picture of the children's diagnoses and which information does not appear in her notes at all, is not reflected by the record. The reality is, Ms. Derbyshire stated in her testimony on August 25, 1987 that she would in fact provide her file cards, and indeed she did so at this proceeding, insofar as they pertain to the children who were evaluated. She was on the witness stand for two days, and was extensively cross-

examined. The statement of Appellant's expert that Ms. Derbyshire's history of these children excluded significant information that she had thrown out, and the inference that there was material information withheld, and that this information would have vindicated the licensee and discredited the children, is likewise, not supported by the record.

After a careful review of the specific instances which this expert witness sees to be discrepancies, leading questions, and undue influence being brought to bear upon these children, it is concluded that these contentions are largely unsubstantiated. To the contrary, after a careful review of his testimony, and the references made to earlier testimony of others, it is concluded that the witness has made invalid assumptions in his analysis of the testimony and exhibits and this, coupled with his lack of specialized expertise in this field, requires his opinions to be discounted.

The likelihood of such evidence of child sexual abuse as gonorrhea or semen being attained is not likely, according to research in this area. Therefore, it behooves the State not to wait for such evidence before moving for delicensure to protect the children, when it has plausible, probable and credible evidence to believe that abuse has occurred at a licensed day care facility.

The fact that some parents believe their children suffered no harm, contrary to the reports of other children, is not necessarily probative. Some children might not show signs of having been abused, except to experienced health professionals, and even so, sometimes physical injury is not caused by abuse, especially in respect to the anal opening. Some children will deny that they have been mistreated, and sometimes they remain friendly with persons who have taken advantage of them.

Regarding the Appellant's contention that no new evidence of any alleged sexual abuse has been shown to have

occurred at Bo Peep during this license year, it is concluded that the evidence given at this latest administrative proceeding amply reveals that persons still at the Bo Peep Day Nursery have engaged in wilful misconduct which resulted in harm to the children. The licensee is responsible for ensuring the safety and well being of the children. Given the finding that mistreatment of children did occur at the facility, it is concluded that the facility should have its license revoked and its renewal application denied.

While this writer quite naturally would have preferred that the State inspect thoroughly the facility as suggested in my previous decision, I nevertheless agree with the reasoning advanced by the State, and its citation of cases, which support the notion that a procedural requirement, such as a facility inspection is not required when the affected entity is in a situation dissimilar from the norm, and when some greater interest is served by that digression. The Bo Peep facility was found to have been in violation of the regulations after the 1987 hearing. The testimony on regulatory requirements and about the maltreatment of the children at this latest proceeding reinforces and substantiates the earlier findings of gross and serious violations of the regulations.

It is further concluded that the Health Officer's reliance on an earlier administrative decision is not an improper delegation of authority to a Hearing Examiner. This writer, as the Hearing Examiner in Case #87-M-105, merely affirmed the propriety of the action which had been initiated by the Health Officer. In the instant case, the Health Officer has cited his being upheld in the previous action by the Hearing Examiner, by the Department of Health and Mental Hygiene, and by its Board of Review. The Health Officer has in fact decided to revoke and to deny the relicensure application. This is his lawful decision to make, and it is subject to being challenged by the Appellant through the administrative appeal process, of which process she has availed herself. The fact that the Health

Officer quotes from the Hearing Examiner's decision, does not mean that the Health Officer has abdicated his legal responsibility in acting to permanently revoke and to deny the reapplication.

Finally, it is concluded that the evidence the Department has presented is sufficient to constitute adequate and legal reasons for denying relicensure to the Appellant. The contention that it is necessary to prove deficiencies which have occurred during the current licensure year in order to act adversely on that license, is rejected. Clearly, the fact that injurious treatment, found to have occurred at the hands of current staff and operators of the Bo Peep facility, is sufficient to cause the facility to be delicensed. It is entirely proper and, in fact, mandated upon these findings, that the license be revoked. It is confirmed that Section 14-102 and Section 14-104 of the Health-General Article of the Maryland Annotated Code require that day care centers be operated in a manner which provides children with safe conditions and proper care, protection and supervision. It is concluded that the Health Officer's reliance on these sections is justified.

In his letter dated March 26, 1988, the Health Officer cited COMAR 10.05.01.12, as well as Regulations .18, .49, .59, .60, .76, and .65, as continuing to be violated at present. Inasmuch as there was insufficient evidence proffered at this administrative hearing to support these contentions, this rational for denying the reapplication for licensure is found to be unwarranted. However, his contention that COMAR 10.05.01.50A was violated, i.e. that adequate service and supervision at all times has been lacking, is upheld, as is the contention that children were subjected to injurious treatment in violation of COMAR 10.05.01.46.

RECOMMENDATION

In light of the Findings of Fact and Conclusions of Law contained above, it is recommended that the action of the

Health Officer for Harford County to permanently revoke and deny the application for re-licensure of the Bo Peep Day Nursery, be AFFIRMED.

Date: August 23, 1988 /s/ Wm. F. Clark

William F. Clark, Esquire
Chief Hearing Examiner
Office of Administrative
Hearings and Appeals

APPENDIX

The matter of the licensure of Bo Peep Day Nursery has consumed a great deal of time and expense on the part of both parties to this appeal, and community interest is high.

In assessing this case, it would be appropriate to relate excerpts of published research material dealing with child abuse occurring at day care centers. It is expected that this would be helpful in understanding the incidence and *modus operandi* of this activity. Most of what follows is a partial extraction taken verbatim from the Exhibits referenced and therefore, quotation marks are not supplied.

The Family Research Laboratory of the University of New Hampshire issued its final report in March, 1988, entitled "Sexual Abuse in Day Care; A National Study." The study describes the problem of sexual abuse in day care: its incidence, dynamics, and impact on children. It also documents the experience that investigators and prosecutors have had in responding to the problem. This study was prepared under a grant from the National Center on Child Abuse and Neglect, with additional support from the National Institute of Mental Health. The study attempted to identify all cases of sexual abuse in day care reported nationwide during the period January, 1983 through December, 1985. The study identified 270 cases of sexual abuse in day care, meaning 270 facilities where substantiated abuse had occurred, involving a total of 1,639 victimized children. The study concludes that although a disturbing number of children are sexually abused in day care, the large numbers coming to light are not an indication of some special high risk to children in day care. They are simply a reflection of the large number of children in day care and the relatively high risk of sexual abuse to children in all settings. The study estimates that the risk to children is 5.5 children sexually abused per 10,000 enrolled. This is lower than the risk that children

run of being sexually abused in their own households, which the study calculated from national reporting figures to be 8.9 per 10,000 children under six years of age. Exhibit 36A, at 4.

This study found that in the 270 cases where a child was abused in a day care setting, 25 percent of the abuse occurred by a family member alone, i.e. a husband or son, and 17 percent of the abuse occurred through multiple perpetrators. The study found that the multiple perpetrator cases are clearly the most serious ones, involving the most children, the youngest children, the most serious sexual activities, and the highest likelihood of pornography and ritualistic abuse. Women constituted 40 percent of the abusers in day care, a proportion much higher than in other locations of sexual abuse. Men were still responsible for the majority of abuse in day care, even though they accounted for only an estimated 5 percent of day care staff. The study found that abusers did not have characteristics that one would associate with pedophilic child molesters and only a few (8 percent) had a prior arrest for a sexual offense. Neither were the abusers who were staff members poorly trained (50 percent had some college education) nor inexperienced (two-thirds had been employed 2 years or more). Abusers in day care do not fit prevalent stereotypes about sexual abusers. Exhibit 36A, at 5.

Girls are abused more frequently than boys (62 percent vs. 38 percent), but boys are abused more frequently in day care than in other locations of sexual abuse. The most common ages for victims are 3 and 4, reflecting the most common ages for children in day care. Exhibit 36A, at 6.

The study found that one of the most important findings concerns the large amount of abuse that occurs around toileting. In two-thirds of all cases, abuse occurred in the bathroom of the facility. This is a locale where abusers can be alone and unobserved with children, who can be tricked into undressing and allowing their genitals to be

touched. The most common form of abuse is the touching and fondling of children's genitals. Penetration (including oral, digital and object), however, is remarkably frequent considering the young age of the victims; it occurred to at least one child in 93 percent of all cases. Allegations of ritualistic abuse ("the invocation of religious, magical or supernatural symbols or activities") occurred in 13 percent of the cases. Exhibit 36A, at 6.

The study's overall impression was that children in day care cases were more threatened, coerced and terrorized than in many other kinds of sexual abuse. The authors opined that this may be because young children are unpredictable, and perpetrators believed they needed to use "overkill" to avoid disclosures. Abusers were relatively successful in preventing disclosure. In one-third of the cases, abuse went on for more than six months before a child told. In over one-half, it took at least a month. Immediate disclosure occurred in about one-fifth of all cases. Disclosures came about primarily in two ways. Most of the time, parents noted something suspicious about their child, i.e. physical symptoms, pain, fears or sexual behavior, and this prompted them to question their child in a way that eventually led to disclosure. Exhibit 36A, at 7.

The study found that most important and disturbing, there were extremely few cases in which staff members at the facilities were the source of disclosures. The authors of the study doubted that this was because staff members never had suspicions or never received disclosures from children. Rather they believed this indicates that there are many disincentives, a great deal of reticence and reluctance to report, massive ignorance and inattention, as well as a few cases of actual covering up of abuse, on the part of staff. The authors of this study also noted some disturbing patterns of behavior on the part of some parents. In some cases, parents failed to believe their own children's allegations. In other cases, parents who believed their children's disclosures tried to arrange informal so-

lutions with operators that would avoid the need for a formal report or an investigation. Exhibit 36A, at 7.

The children who had been abused manifested a variety of symptoms and problems, the most common of which were fears and sleep disturbances. Regressive behavior and inappropriate sexual behavior were also frequent. In 62 percent of all cases, at least one child sustained a physical injury. Children had more symptoms when they were abused by care givers (i.e. teachers as opposed to outsiders), when the abuse involved force or ritualistic activities, and when their own mothers had some kind of impairment that limited the kind of support they could give. Exhibit 36A, at 7, 8.

The study found that facilities with excellent reputations, well-qualified directors and years of operation were just as likely to harbor individuals who sexually abused children. Exhibit 36A, at 8

This New Hampshire study showed that 16 percent of the perpetrators were owners or directors of day care, and because they often had co-perpetrators, 25 percent of the cases (as opposed to perpetrators) involved an owner/director-abuser. Exhibit 36B, at 21.

Another 32 percent of the perpetrators were teachers or other child care professionals in the day care facilities. Another group of perpetrators (15 percent) occupied what could be called "non-professional" roles. This category includes primarily teachers' aides and non-degree assistants as well as "volunteers" such as parents and teenagers who help out irregularly, but who often, given the economic realities of day care, comprise an important proportion of day care staff. These aides and volunteers were rarely well-screened and often of questionable status and reliability. Exhibit 36B, at 23.

25 percent (90) of the abusers were family of day care directors or other staff; moreover, 36 percent of all cases

involved such a perpetrator. The largest number of these family members (40) were husbands of teachers/directors, followed by the adolescent sons of teachers/directors (29). Exhibit 36B, at 24.

The study found 17 percent of the sample involved multiple perpetrators. Multiple perpetrator cases were those with the largest number of victims (average of 13.8 compared to around 3.7 for the rest of the sample). These were also the cases most likely to involve allegations of pornography and ritualistic practices, extended and bizarre abuse. In these cases, the abuse was most systematic and went on for the longest time. These cases included centers like McMartin and Country Walk, which generated a great deal of publicity, some community hysteria, as well as long and complicated investigations. These were the cases whose allegations seemed to strain public and professional credulity. They were also the cases in which the children appeared to have suffered the most serious and lasting kind of damage. Exhibit 36B, at 32.

Women in general commit much less sexual abuse than men, according to available research. Studies indicate that only 5 percent of sexually abused girls and 20 percent of sexually abused boys were abused by women. However, in the day care cases studied, the number of women was much higher than in other sexual abuse: In 270 cases, there were 147 women perpetrators, 22 of whom were studied in the in-depth sample. Although, as in other studies of child sexual abuse, the majority (60 percent) of the perpetrators in day care settings were men, 44 percent of the abusers were women, and 36 percent of the cases involved female perpetrators. Women were significantly involved in sexual abuse of both boys and girls in day care settings. Exhibit 36B, at 34.

Women were perpetrators in 96 (36 percent) of the 270 cases included in this research. In these 96 cases, a total of 147 female perpetrators were identified. 22 women and

36 men were studied in the sample of in-depth cases. The women ranged in age from 16 to 77, the median age was 35. Most were married (63 percent), and only 4 (21 percent) had never married. Many had children of their own (68 percent). The majority of the women were white (68 percent). While the women, as well as the men, were from all social strata, they were more homogeneous in regard to occupation than were the men. In 90 percent of the cases in the full sample, the women were employees of the day care facility, primarily in child care roles. About one-half of the women were the director or owner/operator, and half were child care staff or teachers. Exhibit 36B, at 35.

The women in general were "more respectable" than the men. They were more likely than the men to have a high school diploma and college degree, reflecting their higher occupational status (primarily as day care employees). Many had been highly regarded in their communities as church and civic leaders, intelligent businesswomen and generally law-abiding citizens. While 53 percent of the men were identified as socially isolated, this was not characteristic of the women (16 percent) who were, in addition, less likely to be single. Women were also less likely than the men to have a known history of any deviant behavior. That is, the women were less likely to have been reported to have alcohol abuse problems, prior psychiatric treatment history, no known police records, arrests or prior school problems. These differences were not large enough to be statistically significant, but do suggest that women who sexually abuse children are unlikely to be detected by a criminal records check or knowledge of past history of recorded deviance. Exhibit 36B, at 35.

The study finds that although they abuse much less than males in general, in day care, women make up a third of the total abusers and half of the abusers among care givers. Parents and investigators seem much more apt to

dismiss suspicion about females because they believe abuse by females is so improbable. Exhibit 36B, at 61.

Not surprisingly, cases with large numbers of victims were usually cases with multiple perpetrators. It was noted that in 83 percent of multiple perpetrator cases, there were three or more victims. The authors suspect that this was not simply because more perpetrators required more children. It was also because when two or more perpetrators were cooperating, there was protection and cover, which allowed for more extensive abuse. In the extreme cases, in which all staff of a facility were involved, the perpetrators had virtually unlimited access to all children. By contrast, single perpetrators most often were acting furtively with private access to smaller numbers of children, and thus could abuse only a more limited number of victims. Interestingly, the presence of female perpetrators was also associated with higher numbers of victims, but this was related to the fact that the cases with female perpetrators were more likely to be multiple perpetrator cases. Exhibit 36B, at 64.

When the perpetrators were family members of teachers and directors in home settings and were acting alone, there was a marked preference for female victims. Why gender differentiation assumed unusual importance in these cases is somewhat unclear. Exhibit 36B, at 67.

Families of victims in other cases were described in various negative ways: "isolated", "extremely disorganized", "bizarre", "downtrodden", "emotionally needy mom", and "not available". In several cases, there were allegations that the child had been sexually abused by the father or other family members. However, the study found that such stereotypes clearly did not fit the families of most of the victimized children. For only 22 percent of victims, the quality of parenting they received was described as worse than average. For only 17 percent of mothers and 13 percent of fathers did an investigator note

some impairment, such as a problem with alcohol, mental illness, or previous allegations of child abuse. On the whole, the families of victims appeared normal, and in many cases quite superior. Exhibit 36B, at 73.

The studies found that when allegations of abuse arose, usually they were rebutted by the accused or allies of the accused who tried to impugn the credibility of the victim and suggest ulterior motives for the allegation. In evaluating the validity of allegations, investigators were urged to look for such ulterior motives. If there were any family problems, however small, they were thus generally found, highlighted and entertained as a possible alternative explanation of the allegation. Thus, in several cases, it was discovered that the mother had been sexually abused, and those seeking alternative motives proposed that her own hysteria about abuse may have been behind the child's readiness to make a false allegation. In other cases, it was discovered that the child him or herself, or the child's siblings had been previously abused, and those seeking alternative motives suggested that the child was mistaken about the identity of the offender. Any family problem is likely to be latched onto in the course of the investigation. Investigators looking for problems in the families of children in day care are likely to find them. But this does not necessarily mean that victims are from more disturbed families than nonvictims. Thus, some caution needs to be observed in presuming that family problems are risk factors for children involved in day care. It very likely is a factor in some cases, but probably not so often as investigators think. Exhibit 36B, at 74.

In addition to bathrooms, other areas of the facility were also utilized for abuse because of the privacy they created: bedrooms, offices and closets. One of the obvious risks of having a day care facility in or adjacent to someone's living quarters is the opportunity it provides for privacy. Although a location that is private and isolated may facilitate abuse, it would be mistaken to presume that abuse cannot

occur in public and common areas of the center. In at least a quarter of the cases, abuse did occur in these common areas. In some of these cases, it could occur in a common area because everyone was involved. If the perpetrators had no need to hide the abuse from other staff or other children, then private space is not a requirement. In other cases, the abuse occurred in a common area and simply was furtive enough to be hidden. Exhibit 36B, at 78, 79.

Like the location, the timing of the abuse is often determined by the need for secrecy and privacy. The timing of activities in day care often created situations in which a perpetrator can be alone with one or a few children. In close to a fifth of all cases, for example, the abuse occurred near the beginning or the ending of the day, when fewer children or staff were around. Exhibit 36B, at 79.

Other times when perpetrators could be alone with children were during toileting, overnight, or outdoor play time. In this latter case, the perpetrator would usually have victims stay inside while the other children and staff are playing outside. However, the most common time for abuse to occur was during nap time. Almost a third of all abuse occurred during nap time. Nap time is not generally a time in a center when a few children are isolated. Children are more often all together in a room, but nap time was an opportune time for abuse to occur for a number of other reasons. First, nap time tends to be a time of low staffing. One adult may be allowed to supervise all of the children at that time. Thus, with all the other staff gone, the perpetrator may be free to do what he wants. Second, nap time is also a time when non-staff may be called in to help out. In a family day care, for example, an operator may put her son or husband in charge while the children are supposed to be sleeping, and take that moment to go out. Third, nap time is a time when children may be more compliant. Fourth, many of the children who could be potential witnesses are asleep. Finally, and not to be under-

estimated, nap time may be time when the perpetrators themselves are most unoccupied. At other times, they have the needs of many children to attend to, fights to break up, crying children to comfort. When children are sleeping, activity is low, and the perpetrators may themselves be bored, or at least free to contemplate abuse. Exhibit 36B, at 80, 81.

The victims of sexual abuse in day care suffered from a wide range of sexual mishandling. They had their genitals fondled and touched—the most common occurence, involving 86 percent of all cases and 71 percent of all victims; they were penetrated with objects and fingers; the were subjected to vaginal and anal intercourse, and they were forced to perform fellatio. Digital penetration of the vagina and anus appeared to be remarkably common. Object penetration of the vagina in over half of all cases is also alarming. This included some cases where children had pencils, sticks, screw drivers and ritual objects inserted in them. 93 percent of all cases in the in-depth sample involved some type of penetration on at least one child. However, the authors urged caution in the interpretation of some of these frequencies. They think that the information on the exact nature of many of the sexual acts is very crude. They caution that it must be remembered that most of these details come simply from children's reports, which may have been somewhat inexact about what the perpetrator actually did. It might not always be easy to distinguish from a child's account whether touching between the buttocks actually included penetration of the anus, or whether a penis between the thighs or fondling of the genitals included penetration of the vagina. At the same time, there are aspects that the authors think the children were very clear about. For example, if they had to lick or put a perpetrator's penis in their mouth, they undoubtedly knew there had been some mouth-genital contact. Thus, the authors' finding of fellatio in almost

two-fifths of all cases seems accurate to them. Exhibit 36B, at 81.

The authors of the study calculated that approximately 58 percent of the cases involved acts such as genital to genital contact, object penetration, anal and vaginal intercourse, which were very overt, while the remaining 42 percent involved acts like fondling and digital penetration which were easier to conceal. Not surprisingly, the activities that involved perpetrator exposure were more likely to have occurred in the multiple perpetrator cases, in which perpetrators had less need to conceal their activities from other staff. Exhibit 36B, at 82.

Another important class of sexual activity is when children are forced or encouraged to abuse one another. This occurred in 21 percent of the cases, particularly in the multiple perpetrator situations and the situations that continued over a long period of time. From clinical reports, both within and outside the day care cases, the authors know that it is unusually traumatic when children are forced into the roles of abuser. The shame and the guilt on the part of the child-abuser is particularly intense, and this group would appear to be at extremely high risk of going on to abuse other children in other situations, especially if the trauma had not been addressed by professionals and parents. Exhibit 36B, at 82, 83.

The report found that, in general, cases that went on for longer periods of time involved many more abuse incidents. Moreover, cases involving multiple perpetrators continued for longer periods of time and also involved more incidents. Exhibit 36B, at 85.

In a great many instances, perpetrators used some kind of force or coercion to accomplish their ends. Some kind of physical force—ranging from holding a child down to tying her up, to hanging a child by his heals—was present in 31 percent of all cases, and the threat of force in 42 percent. A variety of other forms of coercion were also

found, such as threatening harm to the children, and threatening harm to the child's family or pets. Exhibit 36B, at 85.

The authors of the report found that much of the threatening that went on in day care abuse was not to accomplish the molestation, but to prevent the child from telling. Children were threatened that if they told, they or their parents or their pets would die, go to jail, or that the abusers would do other terrible things to them. Some of the coercive practices described by the children seem to go far beyond what would presumably be required to get children to submit to abuse, or even to intimidate them from telling. These included locking children in closets, hanging them up by their heals, practicing "magical surgery," and many other horrendous deeds. Exhibit 36B, at 88.

It was the authors' impression that children in day care cases were more threatened, coerced and terrorized than in many other kinds of sexual abuse. On the one hand, because they were so small and helpless, less actual coercion should have been needed to abuse them. But, on the other hand, because they could not be reasoned with and because their behavior was so unpredictable, it seemed to the authors that perpetrators tended to use overkill, particularly when it came to threats about disclosing. Moreover, the day care abuse situation seems to attract more perpetrators whose motives involved sadism and terrorizing in an end in itself. The fear and terror that many of the children suffered as a result of being threatened and coerced seemed to be a special part of the situation of day care abuse. Exhibit 36B, at 89.

This study found that a fifth of all cases were disclosed on the same day that the disclosing child was abused. Almost half of all first disclosures happened within a month after the onset of that child's abuse. However, 32 percent

of the cases were not disclosed for at least six months. Exhibit 36B, at 91.

The authors of this New Hampshire study expected that day care staff would play a key role in the discovery of at least some cases, because they would be in the position to observe suspicious activities with children, or might even be the ones to whom the children would first turn. They had anticipated that in a number of cases, staff would have either interrupted abuse in progress or had suspicions that they then followed up to eventually reveal the abuse. However, the authors were surprised to find how rare this was. The day care staff were seldom the source of a report to the authorities (7 percent), and only rarely the person to whom the "disclosure" was made. Exhibit 36B, at 93, 94.

The authors found several possible explanations for this finding that children rarely disclose abuse to day care staff, and that staff rarely detected or reported abuse. First, children may not feel comfortable telling someone else associated with the facility where they were being abused, because they may fear that all staff are in alliance. Also, acts perpetrated with great furtiveness by a lone offender may not be easy to detect. However, the idea that staff almost never had any suspicions or knowledge seems beyond the realm of plausibility. Staff were in close contact with the children and each other. Unusual behavior by children and other staff must have been apparent. It is possible that staff were poorly trained about child abuse and thus didn't tend to entertain this as a possibility when they observed peculiar actions. But even this cannot be the full story. The biggest problem was probably in the disincentives to staff reporting. Given the pressures that day care operators face, they may lack the confidence to report suspicious behavior on the part of their employees. Staff undoubtedly felt a sense of loyalty toward their centers and their colleagues. They also may have feared losing

their jobs, and thus been disinclined to act aggressively about reports or suspicions. Exhibit 36B, at 94.

Children made direct disclosures to parents and parents elicited disclosures based on their own suspicions. Using the 43 cases of the in-depth sample, the authors found that 37 percent of the initial disclosures were made directly by the children, that is, a child simply told someone, usually the mother, what happened at the day care. Some disclosures did happen spontaneously, but, in many cases, other events were "triggers". These triggers included: a fear of returning to the day care center after an absence; a child feeling safe enough to tell after he/she is withdrawn from a program; or the child being exposed to sexual abuse prevention programs. In several situations, disclosure occurred after the child had been home for a period of time because of vacation, sickness, or simply refusing to go to school. When the child realized that a return to day care was imminent, the fear of returning prompted a report that abuse had been going on. Exhibit 36B, at 95.

Spontaneous disclosure occurred not just when a child was frightened, but also during times when a child felt safe. Some children did not tell until they were no longer enrolled at the day care, or when they were on vacation, or when the perpetrator was away. Given that approximately 50 percent of the victims reported they had been threatened with harm to themselves or their families if they told, it is to be expected that many children were quite afraid and waited until they felt secure that the perpetrator could not retaliate. Exhibit 36B, at 96.

In addition to children disclosing spontaneously, children also disclosed after a discussion prompted by adults, usually their parents. In most cases, the adult had noted some suspicious behavior or symptoms and questioned or examined the child. These accounted for 63 percent of all first disclosures in the in-depth sample. Included here are parents who, concerned with a change in the child's be-

havior or attitude, took the child to a professional (e.g. a doctor or a therapist) who diagnosed the abuse. Parent's suspicion of abuse were most commonly based on behavioral changes in their children, but were also sparked by physical symptoms and suspicious behavior at the day care center. Exhibit 36B, at 96.

In 51 percent of the adult prompted disclosures, there were behavioral changes, such as sleep disorders, sexual acting out, mood swings or fears, that caused parents to be suspicious. Often these behaviors were accompanied by unusual sexual knowledge or awareness that a parent would not otherwise expect the child to have. In 33 percent of the cases in the in-depth sample, children came home with symptoms such as genital bleeding, persistent rashes, sores or infections. Even in these cases, however, the evidence, unless severe and obvious, was sometimes ignored or attributed to other more benign causes. The most common symptoms, however, were fears and nightmares, sometimes difficult to differentiate from normal developmental problems. As a result, they often when undetected as warning signs by parents. Exhibit 36B, at 97.

The authors of the study looked for factors associated with disclosures and, discouragingly, found no correlation between characteristics of the victim and his/her family, and whether a child was the first to disclose. Although they had initially hypothesized that gender, age, and intelligence might be associated with disclosures along with family characteristics such as income level, or quality of parenting, on all the variables they tested, there were no significant differences between first disclosing children and a matched sample of nondisclosures. There were similar negative findings regarding the characteristics of abuse. The severity or type of abuse did not significantly affect disclosure, nor did the use of threats, weapons, drugs, pornography, or ritual abuse. However, the percentages do reveal a trend in the direction of fewer disclosures by children who were subjected to serious coercion, threats,

pornography production and ritualistic abuse. Exhibit 36JB, at 98.

The authors found that responses by parents and investigators varied a great deal. They found that most parties involved tended to proceed with caution, if at all. Some chose not to believe or not to act, others sought second opinions, and some looked for informal ways to handle the allegations and stop the abuse. The authors found that cases of parental denial, even in the face of investigator's convictions, tended to be multiple victim cases. Sometimes this denial dissipated with time and evidence, but for others, the denial never ended. Exhibit 36B, at 100.

The authors of the New Hampshire report conducted interviews with 15 nationally recognized therapists and clinical investigators who have been working with victims of child sexual abuse in day care. These therapists and investigators were primarily involved with children from multiple victim/multiple perpetrator cases, in other words, some of the most severely and repeatedly abused children. Victims of day care abuse evidenced a broad range of symptoms in the wake of their maltreatment. These symptoms have been divided into two categories: psychological symptoms and physical symptoms. Each symptom is discussed by the authors in order of the frequency of its occurrence.

PSYCHOLOGICAL SYMPTOMS

Fears

Fear was the most commonly mentioned reaction. More than two-thirds of the victims exhibited symptoms such as fear of going to day care or being left alone, or fear of real or imagined objects or persons. Fears ranged from the ordinary to the bizarre. Although fear of monsters, masks, uniforms and animals are commonly reported by the average three year old, for children abused in day care, many of these fears persisted beyond a normal time

period and immobilized them sometimes, causing extreme patterns of flight and fright. Several of the therapists interviewed also mentioned perpetrators dressed in police uniforms. Perhaps intending to play on children's fears, this caused problems when uniformed police investigated allegations and interviewed victims. Exhibit 36B, at 107, 108.

Nightmares/sleep disturbances

Nightmares are uncommon for children under three years old. Yet, 87 percent of the victims under three years old experienced problems with nightmares and night-terrors. With such a young sample overall, the finding that 68 percent of the victims experienced nightmares and other sleep disorders is traumatic, according to the authors. Exhibit 36B, at 108.

Clinging behavior

This was widespread (53 percent) in both boys and girls. Exhibit 36B, at 108.

Sexual acting out

This included a range of inappropriate behaviors and attitudes: excessive masturbation; simulated sexual acts with siblings or friends; precocious or flirtatious behavior; unusual sexual knowledge for the child's age, developmental level, and exposure to sex at home; confusion about sexual norms; sexualized kissing in relationships between parents and friends; sexual preoccupation; and compulsive sexual behavior like grabbing breasts or genitals or compulsively removing clothes. These types of behavior were exhibited by almost half of all victims. Exhibit 36B, at 108.

Bed wetting

This was the most frequently mentioned type of regressive behavior, and it seems to be a common reaction for sexually abused preschool children. The authors said

that in the study by McFarlane and Waterman, 1986, over one-third of the children responded this way, and a large percentage of these children were those under 4 years old. Exhibit 36B, at 109.

Crying

As with bed wetting, there was increased crying among one-third of the victims. However, for preschool children, crying is a common behavior, and it is difficult to assess whether crying among victims was always related to the abuse. For some parents, the change was so dramatic and persistent that it seemed undeniable that abuse was the source of the problem. Exhibit 36B, at 109.

Aggressive behavior

This factor was a problem for almost one-third of the victims. Victims hit or bit other children, destroyed playthings, and got into fights or screaming matches. The therapists interviewed considered the aggressiveness primarily an externalized attempt to gain some control after an abusive situation that left victim feeling powerless. This was particularly a problem for victims who had been forced to abuse other children. Exhibit 36B, at 109, 110.

Distrust of adults

Distrust seems a logical response for a child who has been betrayed by a trusted adult. For most children, day care is their first contact with an institution outside of the family, so the impact of this betrayal may get easily generalized. The betrayal is aggravated when they see their parents have been unable to protect them. They also sometimes assume that their parents were aware the abuses were occurring. With 29 percent of the victims in this study, the abuse instilled either a global distrust of adults, or specific distrust of adults of the same sex or resembling the perpetrator. Exhibit 36B, at 110.

School adjustment and play behavior problems

Such problems seem a natural outgrowth of day care abuse. First of all, if a child associates abuse with a school setting, then adjustment problems will most likely occur in any new school setting. Secondly, if a child is acting out as a result of the abuse, then his/her behavior will cause difficulties with other children and affect school adjustment and play. Finally, when abused children are placed in a new setting with non-victimized children, as often happens when a center is closed, the victims often feel stigmatized. Exhibit 36B, at 110.

Tantrums

Approximately 25 percent of all victims in this study had a problem with tantrums after the abuse. Exhibit 36B, at 110.

Other symptoms that the authors found were toilet training problems, blaming of parents, and learning disabilities. Exhibit 36B, at 110, 111.

PHYSICAL IMPACT

In the majority of the cases in the in-depth sample, at least one child suffered some physical injury from the abuse. In 62 percent of the cases, at least one child had injuries related to the sex acts, and 45 percent of all the victims suffered such injury. These injuries ranged from irritation and swelling of the genitals to rectal and vaginal tears and venereal disease. In 54 percent of the cases, a medical exam indicated that there was some genital irritation, in 42 percent of the cases, there was actual sexual trauma, and in 12 percent of the cases there was venereal disease. The authors considered "irritation" to mean redness, inflammation, rashes, vaginitis, swelling, or infections, and "sexual trauma" to mean rectal and vaginal sores, abrasions, lesions, abnormalities, and large vaginal openings, tears or scars. "Disease" was meant to be

herpes, gonorrhea, or venereal warts. Exhibit 36B, at 11, 112.

In some cases, the injuries to the child were severe. In other cases, the injuries were not immediately noticeable. In many cases vaginal and rectal scars were observed only after reports of other children resulted in medical exams for all those attending the day care. Exhibit 36B, at 112.

Many parents originally noted the symptoms without understanding their meaning. It was unfortunately common for parental concerns to be minimized by family, friends, or physicians, who assured the parents that they had nothing to worry about. "The rashes are caused by bubble baths," "infections are often reoccurring and just resistent to treatment," are two examples of counsel given by pediatricians to anxious parents. Most parents and doctors do not suspect sexual abuse as a possibility for preschool children and, thus, it often went undetected or misdiagnosed. Exhibit 36B, at 113.

The authors found that if any of the perpetrators of abuse was a child care worker or director (as opposed to janitor, family member or outsider, for example), then the child was likely to experience a greater number of symptoms regardless of the sex of the perpetrators, or whether the case involved force, ritualistic abuse, or acts of sexual penetration, and regardless of the quality of parenting. Abuse by a care giver must be more violative of a child's sense of trust, security and safety, leaving the child with a more profound sense of betrayal. Abuse by someone close to the child probably also creates more fears that other trusted adults will also be abusive. Exhibit 36B, at 118.

The authors found that victims forced to victimize others were more likely to manifest increased aggressiveness, sexual acting out, or inappropriate play behavior. Children who experienced ritualistic abuse were more likely to manifest "subconscious" symptoms (nightmares) and "regres-

sive" behavior (bed wetting, toilet training problems, and clinging). Exhibit 36B, at 121.

The authors of the report found an unexpected set of risk factors related to geography. Abuse in programs in large cities or urban areas or in areas of high crime was less serious, i.e. less likely to occur more than once, less likely to last more than a month, and less likely to involve more than one victim. Abuse which occurred in rural areas or small cities and towns was significantly more serious: 94 percent of the cases involved abuse of long duration (more than one month) compared to urban area cases where only 44 percent of the cases were more than a one month duration. 76 percent of the small cities/rural area cases involved more than one victim, compared to only 32 percent of the urban area cases. Parents in smaller towns and more rural areas in which there is generally a lower level of crime may be more trusting, less suspicious, less adept at spotting environmental cues, and slower to confront and investigate. Exhibit 36B, at 133.

The authors of the study found a strong reputation to be no indicator of reduced risk of sexual child abuse. In fact, in a number of cases, the reputation of the program only made it more difficult for the parents and the community to believe abuse could have occurred. Exhibit 36B, at 137.

The authors found that only 9 percent of the facilities in their full sample were unlicensed. Exhibit 36B, at 137.

Most of the abuse at facilities in the New Hampshire study were licensed. Only 3 percent had ever been placed on probation, and none had ever been closed. Of licensed programs, 82 percent had received a site visit in the year that the abuse occurred. These inspections failed to prevent abuse, either because there were no obvious clues, or because such clues were ignored. Licensing authorities traditionally have not had a high index of suspicion about abuse and have concentrated more on inspecting the physical

facility and records. Even where licensing authorities focus on the quality of care that children are receiving and added additional site visits to their schedule, abuse may occur. Exhibit 36B, at 138.

The study found that in approximately one-third of the full sample of 270 day care centers where sexual abuse occurred, the perpetrator was related to another staff member. In the majority of multiple perpetrator cases, a family member was involved. Since family day care is generally in homes and thus accessible to non-employee family members, this is where the majority of abuse by family members occurred. Most family perpetrators in family day care were either without responsibility for children or served in an unofficial capacity, such as when the operator left the house on errands. Exhibit 36B, at 140.

The authors of the report stated that non-perpetrators may be reluctant to report suspicions about the activities of their relatives because they fear the embarrassment that an investigation will bring, or because they are afraid to confront that individual, or because they simply cannot believe that such a thing could be true. The family ties encourage collusion and cover-up in the abuse. Exhibit 36B, at 140, 141.

There was controversy over the issue of fantasy in young children's reports, and not a great deal of scientific evidence to guide professionals. Some investigators are concerned that children in some circumstances concoct stories that include suggestions of sexual abuse. They believe that other irrational elements in the account need to be taken as clues to the fantasized character of the whole story. Other investigators believe that fantastic elaborations may be something that children concoct when under stress. Thus, the stress of a real abuse situation may lead a child to include elements that did not actually occur in addition to elements that did. Still other investigators point out that the fantastic accounts may be the child's construction

of real events. In 13 percent of the cases of child sexual abuse in day care, there were reports of the presence of ritualistic elements. Bizarre content in the children's reports, according to many who investigated these cases, may not be due to fantasies, but reflect sadistic and ritualistic practices in the abuse, or may have been intentionally introduced by the perpetrators to make the child's report less credible. These explanations are not necessarily mutually exclusive. It is undoubtedly true that in some cases, investigators' prejudices about children play a role. There is a presumption in the criminal justice system, codified into law in some jurisdictions, that children under a certain age (usually 6) are not competent to tell the truth. The law may encourage investigators' skepticism regarding children's reports. The presumption of young children's incompetence and a lack of knowledge about child emotional and cognitive development is reflected in the handling of many cases. Exhibit 36B, at 172.

Other literature in the area of child abuse, aside from the New Hampshire report, reflects that the sworn testimony of a mother or therapist may give a better picture of the young child's experience than even an expert examiner, who is a stranger, can obtain in an interview situation. (Exhibit 42, at 620).

This article reflects that occasional maturbatory and exploratory behaviors are both common and normal, but their intensity and recurrence implies sexual overstimulation and/or trauma. They suggest sexual abuse except in rare cases where normal sexual behaviors used for self-stimulation or for relaxation by severely deprived children are exaggerated by an extreme overreaction based on distorted parental sexual attitudes which are usually obvious when looked for. Exhibit 42, at 622.

It is generally recognized that the lack of medical evidence does not disprove sexual abuse, however, where there has been a disclosure, medical findings may be cor-

roborative, especially where young children have been victimized. Exhibit 40, at 219, 221.

Other literature reflects that present research trends indicate that children's memories are considerably more reliable than previously thought. To assume that children's memory is worse than adults' memory is not true. Exhibit 41, at 612.

The majority of children of three years of age and older (and most children over five years of age) can reliably register, retrieve, and describe an abuse event. This is true, if the abuse allegation is understood from the child's developmental level. First, recognition, not recall, memory must be relied on for these children to successfully retrieve the experience. Meaningful cuing of the young child's memory is important. Second, disclosures that occur naturally and are not in response to direct or leading questions are more reliable. Third, novel events are remembered with more detail than routine events. A child, whose abuse was relatively innocuous and routine compared with the rest of their life, will remember less detail for individual events than a child whose abuse was traumatic. Also, given the child's susceptibility to suggestion the clinician should look diligently, both during the assessment of the child and family and in evaluating other sources of information, for evidence the child is being influenced. Finally, a child under three is prone to confuse memories making their recollections less reliable. With these children their behavior in the context of their real life is a more reliable indicator of whether abuse occurred or not. Exhibit 41, at 613.

Other literature in the field indicates that a child between the age of 2 and 7 is in the pre-operational period of development, characterized by a cognitive style that would work significantly against clarity in an allegation of sexual abuse. A child's tendency for "centering" in thinking, for example, causes perception and definition of an

object in relation to its particular function; thus, a child may refer to ejaculation as urination since that is the perceived function of the penis. Similarly, the lack of conservation characteristic of this developmental period prevents the child from understanding that objects remain the same despite a change in physical appearance; in the child's perception an erect penis, for example, may no longer be thought of as a penis because of its change in size and shape. Pervasive transductive reasoning, which causes a child to reason from one particular idea to another without logically connecting them, creates a vague, free associative style of communication which, further encumbered by difficulties with language, precludes any real clarity. The literature demonstrates that children are seldom swift in reporting sexual abuse. Delays in disclosure lasting anywhere from days to years are frequently reported in the literature; they are largely attributed to the pressures for secrecy placed on the child by the offending adult and to the child's developmentally based tendency to accommodate the demands of adults. Delays in disclosure, then, are more the rule than the exception and, once again, should not be used as a rationale for doubting the truthfulness of an allegation. Exhibit 43, at 552.

Because a child between the ages of 2 and 7 does not yet have the mental structures needed for logical or abstract thought, (hence the term "pre-operational") this leaves the child dependent on actual experiences for producing the images of fantasy. Sexual abuse is not likely to be a theme of the fantasy in the first place, and therefore will not be the stuff of lies. Exhibit 43, at 557.

This same article reflects that the scheme advanced by researchers Finkelhor and Browne is the most systematic, the most closely tied to empirical and clinical research, and the most specific to the sexual abuse experienced. Thus, it is found to be particularly useful as an indicator list in the proposed conceptual model for judging the truth-

fulness of a young child's allegation of sexual abuse. Exhibit 43, at 556.

Finkelhor and Browne's conceptual model organizes clinical observations of the child's sexual abuse indicators that are reported in the literature. They posit four traumagenic dynamics that can be used as indicators of sexual abuse. One of the factors is traumatic sexualization. This is inherent in the abuse experienced when the perpetrator rewards the child for sexual behavior and fetishizes some parts of the child's anatomy; the process shapes the child's sexual feelings and attitudes in developmentally and interpersonally inappropriate ways. As a result, the sexually abused child may learn sexual behavior as a strategy for manipulating others. Symptomatically, the child may become sexually aggressive, engage in repetitious play with a sexual theme, compulsively masturbate, or demonstrate age inappropriate sexual knowledge and interests. Betrayal is the second traumagenic factor intrinsic to the sexual abuse experience: the child's trust and dependency are betrayed by the offending adult and the child may react with grief, depression, or extreme dependency and clinging behavior. A third traumagenic factor in sexual abuse is disempowerment, in which the child's needs, desires, and will are continually contravened by the offending adult. Symptoms related to this facet may include anxiety, fears and phobias, nightmares, and hypervigilance. Stigmatization is the final traumagenic factor. Messages that have to do with shame, guilt, blame, and fault are often communicated to the child by the offending adult. Resultant symptoms may include guilt and shame, low self-esteem, suicidal ideation, and self-destructive behavior. Exhibit 43, at 556.

APPENDIX E

HARFORD COUNTY HEALTH DEPARTMENT

119 South Hays Street P.O. Box 191 Bel Air, Maryland 21014-0191

Telephone 838-3047/879-2404

Thomas M. Thomas, *Health Officer*

Beverly Stump, P.D., MPH, *Deputy Health Officer*

March 26, 1988

Mrs. Deborah S. Cassilly
Bo-Peep Day Care Nursery
144 Hickory Avenue
Bel Air, Maryland 21014

Dear Mrs. Cassilly:

This is to advise you that I have reviewed your application for renewal of the license to operate the Bo-Peep Day Care Nursery. In addition to my review of the material you have submitted, I have also reviewed the entire licensing file on the Center, including on-site inspections made by my staff as well as State Health Department staff.

For the reasons set forth below, I have decided to deny renewal of your license to operate the Day Care Center:

(1) I have evaluated your application and the licensing materials to determine if the continued operation of your Center is consistent with the legislative requirements set forth in Health General Section 14-102 and 14-104. In particular, I have reviewed the specific provisions of Section 14-104 requiring that group day care centers operate in a manner which provides children with safe conditions in addition to "proper care, protection and supervision." I have concluded that the continued operation of this center is not consistent with these statutory objectives.

(2) Further, I am permanently revoking and denying renewal of your license on the basis of the regulatory violations found in the decision of William F. Clark, Esq. dated November 16, 1987, a copy of which is attached hereto and incorporated herein. Specifically, I hereby adopt and incorporate the discussion, findings of fact and conclusions of law set forth in that decision. The regulatory violations upheld by Mr. Clark which continue to present a threat to the health and safety of children at this facility are as follows:

COMAR 10.05.01.12- Minimum Age
.18- Use of Unauthorized Space
.49- Copy of Regulations to Parents
.59- Group Size and Staffing, Children in Attendance
.60 and .76- Staffing Pattern
.65- Records
.50A- Adequate Service and Supervision at all Times

The Hearing Officer in his findings stated that "the facts show that many of the day care regulations have not been followed. The sum of the evidence requires that the facility not continue in operation with a license from the Department."

3. We continue to be deeply concerned over the management of the Center and the capability of the staff to provide for the adequate protection and supervision of the children. Based on our staff review of the Center's operations, we do not feel that there is adequate assurance that the continued operation of the Center under the existing staff will provide for appropriate supervision of children as required by COMAR 10.05.01.50A.

4. The hearing officer held there were repeated instances in which children enrolled in the center were subjected to injurious treatment in violation of COMAR 10.05.01.46. These findings reflected numerous deficiencies

in the management, staffing and operation of this center. The continued operation of this center as detailed in your license renewal application is inconsistent with COMAR 10.05.01.46.

You have the right to appeal this decision and may file a written appeal as provided in Maryland Health-General Code Annotated Section 14-112 (1987 Replacement Volume) and COMAR 10.05.01.10. Such a request should be submitted in writing within five days following service of this notice to:

William F. Clark, Chief Hearing Examiner
Department of Health and Mental Hygiene
300 West Preston Street
Baltimore, Maryland 21201

Yours truly,

/s/ Thomas M. Thomas
Thomas M. Thomas
Health Officer

cc: Adele Wilzack, R.N., M.S., Secretary DHMH
Ruth Massinga, Secretary, Department of Human Resources
Dr. Ruth Singer, Director, Local Health Administration
Jestine Pryor, Chief, Group Day Care Licensing
Tresa Fleisher, Licensing Coordinator, Harford County
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MAR 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1294

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DEBORAH CASSILLY,

Petitioner,

v.

MARYLAND DEPARTMENT OF HUMAN RESOURCES, *et al.*,

Respondents.

On Petition For A Writ of Certiorari To The Court of Appeals of Maryland

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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16 pp

COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Did the administrative agency which permanently revoked petitioner's day care center license because of shocking evidence of child abuse at the center violate petitioner's federal due process rights when (1) the agency's action is sustainable based on substantial evidence as to which petitioner raises no constitutional objection; (2) petitioner had the opportunity to challenge the medical and other evidence presented against her; and (3) petitioner never invoked her right to subpoena the children whose hearsay statements she now challenges?

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COUNTERSTATEMENT OF THE CASE

A. Preliminary Proceedings.

Bo Peep is a child day care center located north of Baltimore in Harford County, Maryland. In July, 1987, agencies of the State of Maryland (now respondents and here collectively referred to as "the State") sought injunctive relief in the Circuit Court for Harford County against Bo Peep based on preliminary, but severe, allegations of child abuse at the facility. Following four days of evidentiary proceedings, the court issued an injunction preventing a male staff member (the husband of the center's licensee)

from being on the premises. The State continued its investigation. (App. at 4a.)[1]

B. The Suspension Case.

By letter dated July 6, 1987, the Harford County Health Department advised petitioner Deborah S. Cassilly that her license to operate Bo Peep would be suspended because of (a) reports of violations of the State Group Day Care Regulations and (b) evidence of abuse of children enrolled at the facility.[2] Ms. Cassilly appealed the Health Department's action, triggering a seven-day evidentiary hearing in August and September, 1987. (App. at 4a.) On November 16, 1987, the administrative hearing officer issued his Findings of Fact, Conclusions of Law and Proposed Decision, recommending that Bo Peep's license be suspended for the duration of the licensing period, which expired on March 31, 1988. (App. at 4a.)[3]

The hearing officer concluded that "convincing" evidence of physical and sexual abuse of children enrolled in the facility "in and of itself mandates that suspension of a license to operate this day care facility

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[1] Citations in the form "App. at ___" are to the appendix to the Petition for Certiorari. The court also authorized the local police department to make random checks on Bo Peep; ordered the maintenance of a log documenting the entry and exit of every male twelve years or older; and required that Bo Peep document and report all injuries to children on the premises. (App. at 4a.)

[2] Although Ms. Cassilly is the petitioner here, the party in all proceedings below was the day care center, Bo Peep. Ms. Cassilly was the licensee who operated that facility. (App. at 2a.)

[3] Ms. Cassilly did not append the hearing officer's November 16, 1987 proposed decision to her petition. Portions of that decision are quoted in the decision of the Court of Appeals.

be upheld." In reviewing the evidence of abuse adduced at the hearing, the hearing officer concluded that "[t]he evidence in this case points in no other direction" than sexual child abuse: "the physical examination of the children involved here and their behavioral changes as observed by their parents and trained professionals allow no other conclusion to be drawn." (App. at 5a.) Following three separate levels of administrative review, the hearing officer's findings and conclusions were adopted as the final agency decision. (App. at 5a.)

C. The Revocation Case.

By letter dated March 26, 1988, the Harford County Health Department advised Deborah Cassilly that her application to renew her license was denied, and her license was permanently revoked. (App. at 5a; 136a-138a.) Again, Ms. Cassilly appealed and requested a hearing. By letter dated May 2, 1988, just nine days before the commencement of the scheduled hearing, Bo Peep requested sweeping discovery, including an order that the State "make available for interview [by a health professional chosen by Bo Peep] those children who were involved with allegations of child abuse at Bo Peep." (App. at 5a.) Following oral argument on May 11, 1988, the hearing officer denied Bo Peep's request to compel these "interviews." (App. at 6a.)

The revocation case lasted nine days during May and June, 1988. Unlike the earlier suspension hearing, which concerned an array of licensing violations, including, but not limited to, abuse and supervision of children, the revocation hearing solely concerned physical and sexual abuse. Furthermore, the evidence presented at the revocation proceeding "amply re-

veals that persons *still* at the Bo Peep Day Nursery have engaged in wilful misconduct which resulted in harm to the children." (App. at 107a) (emphasis added.)

The cumulative record relied on by the State in support of its decision to revoke Bo Peep's day care license documents shocking abuse perpetrated by senior Bo Peep staff. Two independent physicians with extensive experience in this field testified that eight children attending Bo Peep exhibited symptoms consistent with sexual abuse, including, *inter alia*, anal and vaginal injuries consistent with the insertion of an erect male penis, stretched and traumatized hymenal openings and extensive scarring and other injuries in the anal and vaginal areas. Furthermore, parents and treating professionals testified that they observed numerous instances of behavioral patterns and non-assertive verbalizations symptomatic of abuse on the part of children who had attended Bo Peep. (App. at 6a-7a; 79a-91a; 102a-107a.)[4]

On August 23, 1988, the hearing officer issued a 76-page proposed decision, concluding that the health department's decision to permanently revoke Bo Peep's license should be affirmed. (App. at 77a-135a.) The proposed decision was adopted as the final State agency decision on August 31, 1988. (App. at 76a.)

D. Subsequent Appellate Proceedings.

Bo Peep appealed the agency's final decision to the Circuit Court for Harford County. That court re-

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[4] The "State's experts" to whom Bo Peep repeatedly refers (*e.g.* Pet. at i, 5, 13, 15) were, in fact, therapists who were treating the children and not professional experts retained for this litigation.

versed, finding that the the children's statements to their parents and treating therapists were "foundational" to the State's case, and that Bo Peep's request for an interview of the children by its psychologist would have given it a " 'meaningful opportunity to test the credibility of the out-of-hearing statements. . . .' " (App. at 8a; 52a.) However, the trial court also concluded that the hearing officer had no authority to order such interviews and so the court held that the hearing officer should not have considered those statements. (App. at 7a-8a; 58a-59a.)

The State appealed the circuit court's decision, and the Court of Appeals of Maryland, the highest court in the State, granted review on the State's petition for a writ of certiorari prior to judgment in the intermediate appellate court. (App. at 8a.) The Court of Appeals unanimously reversed the trial court's decision, holding that the licensee's constitutional rights were not violated. (App. at 11a-28a.) The petition to this Court followed.

REASONS FOR DENYING THE WRIT

THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Review is unwarranted because the decision revoking Bo Peep's license is supported by an adequate and independent state ground, and because this case presents no novel or unsettled questions on which the state and federal appellate courts require the guidance of this Court. Further, through the testimony of physicians, parents, and treating therapists, the State painstakingly documented awful physical and sexual abuse of children at the hands of Bo Peep staff, and Bo Peep vigorously cross-examined these

witnesses. There is simply no merit to Bo Peep's claim that the Due Process Clause entitles it to more process than it received in these protracted administrative and judicial proceedings.

A. Even In The Absence Of The Statements That Bo Peep Now Contests On Constitutional Grounds, Substantial Evidence Exists To Support The Revocation Of Its License.

The out-of-court statements with which Bo Peep takes issue comprise only a portion of the vast amount of evidence which supports the administrative agency's decision to revoke Bo Peep's license. As the Court of Appeals noted, apart from these statements, there is "substantial" evidence to support the revocation of Bo Peep's license:

> The Department's decision was based on uncontradicted physical findings, on personal knowledge of adults concerning relevant, nonassertive conduct, on expert opinions based in part on psychologically pertinent history and, *only to a degree, on hearsay declarations which would have been inadmissible as substantive evidence in a judicial proceeding . . . Bo Peep does not contend that that hearsay was both so unreliable and so pervasive as to undermine the substantiality of the evidence against it.*

(App. 24a)(emphasis added).[5]

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[5] *See also* (App. at 12a)("The due process issue arises out of the largely circumstantial way in which the Department proved child abuse at Bo Peep. In general that proof fell into four categories: (1) testimony by physicians stating their observations when physically examining children and expressing their medical

Thus, as a matter of state law, the decision to revoke Bo Peep's license may be affirmed based on evidence completely independent of the children's out-of-court statements that Bo Peep contests. *See* Md. Ann. Code State Govt. Article, §10-215(g) (1984) (judicial review of agency decisions); *accord* (App. at 9a) ("Bo Peep does not argue that there was a lack of substantial evidence before the agency to support its findings of physical and sexual child abuse at Bo Peep."). The petition fails, therefore, to present a substantial federal question because the administrative agency decision that Bo Peep challenges may be affirmed on purely state law grounds. *Cf. Michigan v. Long*, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate state ground.").

B. The Agency Afforded Bo Peep All The Process Which It Was Due.

Further, in holding that Bo Peep's due process rights were not violated, the Court of Appeals correctly applied the three-factor test of *Mathews v. Eldridge*, 424 U.S. 319 (1976). Recognizing that this Court utilizes "a balancing analysis in deciding questions of procedural due process" (App. at 22a), the

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opinions based upon those observations; (2) testimony of parents, social workers and psychologists narrating their observations of relevant nonassertive verbal and nonverbal conduct of the children; (3) statements of history to treating clinicians; and (4) testimony from parents, social workers or other adults relating other assertive statements of the children, that is, statements relevant only for the truth of the content of the statements.").

court below held that a "straightforward application of the principles * * * from *Mathews v. Eldridge* demonstrates that due process has not been violated here." (App. at 22a-23a.)[6]

With respect to the first *Mathews* factor, the Court of Appeals found that "[n]o liberty interest is at stake." (App. at 23a.) While Bo Peep relies on inapposite criminal cases interpreting the Sixth Amendment's Confrontation Clause to support its claim that due process was violated here, it concedes that a liberty interest is lacking in this case. Addressing the second *Mathews* factor, the court below found that "[t]he procedures actually used by the Department greatly minimized the risk of an erroneous deprivation of Deborah's license. There were two protracted hearings before the agency at each of which Bo Peep was afforded all of the protections which will ordinarily satisfy due process requirements in contested administrative law cases. The record of a judicial proceeding in a circuit court was also made part of the agency record." (App. at 24a) (citations omitted.) Additionally, as the court below observed, Bo Peep either cross-examined or had the opportunity to cross-examine all adult witnesses, and thus " 'the probable

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[6] Quoting from *Mathews*, the Court of Appeals identified the three factors that are generally to be considered in analyzing a due process claim: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (App. at 22a)(*quoting* 424 U.S. at 335).

value, if any, of additional or substitute procedural safeguards' " was "minimal." (App. at 25a.)

Bo Peep does not dispute (1) that the hearing officer had no authority to subject the children to an independent examination, *see* (App. at 28a) ("Also weighing heavily against Bo Peep's request for implementation of an additional procedure is that the requested procedure was not within the power of the hearing officer. A court adjudicating a property interest in a civil matter has no authority to compel a pretrial psychological examination of a non-party witness. . . ."); (2) that while it could have resorted to existing procedures and invoked its right to subpoena the children whose statements it contested, *see* Md. Ann. Code, Health-General Article, §2-104(k) (1990 Repl. Vol.), that right was never exercised; (3) that it "either cross-examined or had the opportunity to cross-examine or subpoena any adult" concerning his or her influence on, and evaluation and communication of, children's statements repeated to the hearing officer (App. at 27a); or (4) that it called a range of fact and expert witnesses on its own behalf. (App. at 16a; 92a-101a.)

With respect to the third *Mathews* factor, the Court of Appeals placed appropriate special emphasis on the fact that "the State has an interest in protecting the children from further anxiety, even if there would be less emotional trauma in a psychological interview than in a cross-examination." (App. 28a.) Bo Peep does not challenge the significance of the governmental interest at stake in this case.

In sum, the Court of Appeals' application of the principles set forth in *Mathews* has not led to a result warranting this Court's exercise of its discretionary

certiorari jurisdiction to review this factually unique and legally unremarkable case. To the contrary, the decision below is consistent with those of other courts which have held that due process does not entitle a party accused of child abuse in a civil proceeding to subject abused children to examination when other procedures exist to challenge adverse evidence. *See, e.g., Rodgers v. Norfolk School Board*, 755 F.2d 59 (4th Cir. 1985); *Green v. Board of School Commissioners*, 716 F.2d 1191 (7th Cir. 1983); *see also Papapetropoulous v. Milwaukee Transport Services, Inc.*, 795 F.2d 591 (7th Cir. 1986).[7]

C. Bo Peep Waived Its Due Process Claim.

Review is also unnecessary because Bo Peep's alleged "right of confrontation", Pet. at 17-18, was never exercised and, therefore, was waived. Bo Peep never so much as requested, as it had a right to do, that the hearing officer issue subpoenas to the children whose statements comprised part of the State's evidence. Thus, due process is not offended by the introduction of the children's statements. *See Richardson v. Perales*, 402 U.S. 389, 402 (1971) ("We conclude that a written report by a licensed physician who has examined the claimant * * *, despite its hearsay character and an absence of cross-examination, * * * may constitute substantial evidence supportive

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[7] Thus, there can be no claim that review is warranted here to resolve a conflict between the decision below and that of other state or federal appellate courts. Indeed, as the court below expressly found, its decision is not contrary to those of other courts. (App. at 22a) ("We have neither been cited to, nor found, any decision involving administrative proceedings in which the contention was made that procedural due process required a pre-hearing examination of a nonparty by a health care professional.").

of a finding by the hearing examiner adverse to the claimant, when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician.").

Bo Peep attempts to excuse its undisputed failure to subpoena the declarants of the statements it challenges, claiming that the State had "strong arguments for quashing the subpoenas * * * on grounds of the harmful psychological effects testifying might have on a child, and on the basis of the incompetence of the children to testify." Pet. at 9-10 n.2. But Bo Peep cannot claim that it was denied the "opportunity to interview the children directly", Pet. at 20, when it never even attempted to avail itself of the hearing officer's subpoena power to "confront its accusers" or to compel "interviews" of the children. *See United States v. Cree*, 778 F.2d 474, 478-79 (8th Cir. 1985).[8]

CONCLUSION

For the reasons stated, the petition should be denied.

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[8] Further, unlike *Turner v. Commonwealth*, 767 S.W.2d 557 (Ky. 1988), *cert. denied*, 110 S.Ct. 260 (1989), which Bo Peep states is "in striking contrast" with the decision below (Pet. at 22), not once during any of the administrative proceedings in this case did Bo Peep seek physical examinations of the children. Bo Peep waived its right, therefore, to "confront" the children whose statements it challenges. *See Cree*, 778 F.2d at 478 (holding that no constitutional right was violated when the defense failed to call a child to the stand and that child was present at trial, "as the defense did not make even the slightest attempt to confront" the child).

Respectfully submitted,

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The instant child abuse case presents issues similar to those in *Idaho v. Wright*, 116 Idaho 382, 775 P.2d 1224 (1989), *cert. granted*, 58 U.S.L.W. 3443 (U.S. Jan. 16, 1990) (No. 89-260), but provides an alternative way of dealing with out-of-hearing statements made by children to medical experts. In *Idaho v. Wright*, the Supreme Court of Idaho held it unconstitutional to permit an examining pediatrician to tes-

tify about statements made by a two-and-a-half year old girl during an unrecorded interview in which the pediatrician used leading questions and had a preconceived idea of what the child would tell him. Petitioner in the instant case maintains that admission of similar testimony—testimony by a psychologist about out-of-hearing statements made by young children—may be permissible, but only so long as petitioner's own experts are allowed to interview the children before the hearing.

The question presented in this case deserves review, particularly in view of the Court's decision to review related issues in *Idaho v. Wright* and *Maryland v. Craig*, 316 Md. 551, 560 A.2d 1120 (1989) *cert. granted*, 58 U.S.L.W. 3443 (January 16, 1990) (No. 89-478). Respondents hardly contend otherwise. Instead, respondents, in an opposition that is loaded with irrelevant characterizations of the conduct charged in this case, rely upon three arguments.

1. Respondents' first argument is that the existence of "substantial" evidence provides a state law grounds upon which the decision of the Maryland agency could have been upheld and that review by this Court is therefore foreclosed. However, review of the constitutionality of procedures used is independent of review to examine whether the agency decision was supported by substantial evidence. *See Communications Investment Corp. v. Federal Communications Commission*, 641 F.2d 954, 972 (D.C. Cir. 1981); *cf. Chaney Creek Coal Corp. v. Federal Mine Safety & Health Review Comm'n*, 866 F.2d 1424 (D.C. Cir. 1989); *Consolidated Oil & Gas, Inc. v. Federal Energy Regulatory Comm'n*, 806 F.2d 275 (D.C. Cir. 1986) (engaging in substantial evidence and pro-

cedural due process review independently in the same case). As Petitioner maintains that the procedure employed below violated the due process clause and her license thus was unconstitutionally revoked, no argument about substantial evidence can save the unconstitutional revocation.

Respondents compound their error by arguing that because there is substantial evidence to support the administrative action there is an adequate state law grounds for the decision, citing Md. State Gov't Code Ann. § 10-215(g).[1] That section permits judicial review of agency action both for lack of substantial evidence and for due process violations. It does not provide a legal basis for affirming the judgment of the court below in the instant case. No state law was involved which might independently cure the due process violation.

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[1] Md. State Gov't Code Ann. § 10-215(g) provides:

(g) *Decision.*—In a proceeding under this section, the court may:

(1) remand the case for further proceedings;

(2) affirm the decision of the agency; or

(3) reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision of the agency:

(i) is unconstitutional;

(ii) exceeds the statutory authority or jurisdiction of the agency;

(iii) results from an unlawful procedure;

(iv) is affected by any other error of law;

(v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or

(iv) is arbitrary and capricious.

Respondents do not argue that the constitutional violation of which petitioner complains was "harmless error". Nor can they. Physical evidence consistent with sexual abuse, which respondents point to, is meaningless without the children's out-of-hearing statements. Dr. Charles Shubin, the physician who examined the children and testified on behalf of respondents, conceded the limited nature of his findings as follows:

> Q: Wouldn't it be important to know if the children had some other type of illness or injury that could possibly have contributed to the symptoms that you find that attribute to sexual injury?
>
> A: Let—let's go back now. The sexual injury is different than saying there's child abuse. In order to say there's child abuse, someone has to put together an identification of who has abused the child and match that with what's found. My physical findings and their interpretation do not make the case of child abuse. Because I'd have no way of knowing who did what to the child. . . . That has to be put together by others and I presume that it is when they're active investigations. That's the rule that I play, putting that one piece in place. When that isn't the case, when there is no active investigation, we certainly do assess further in order to meet the criteria for reporting, and so forth,—there is a basis on which we can judge child abuse per se. You'll notice my findings are in case number one, okay, consistent with sodomy. . . . I didn't say someone had sodomized her because I can't.

Hearing Before William F. Clark, Hearing Examiner, Maryland Department of Health and Mental Hygiene, August 31, 1987, pages 855-56.[2] As the Circuit Court held, "the children's out-of-hearing statements were *foundational* to the case as the State would not have had a case without these statements." Appendix 52a (emphasis in original).

2. Respondents next argue that petitioner's hearing satisfied the three-pronged test formulated by the Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Respondents' argument on the first factor—the nature of the private interest affected by the State's action—is based upon its erroneous assertion that petitioner "concedes that a liberty interest is lacking in this case." Brief in Opposition at 8. Petitioner makes no such concession. As is demonstrated in the Petition (at 18-20), respondents' revocation of her day care license means that petitioner may no longer practice the profession for which she is trained and must live with a terrible personal stigma. Petitioner has a compelling liberty interest.

With respect to the second and third *Mathews v. Eldridge* factors, respondents do little more than repeat the arguments advanced in the opinion below. In discussing the second *Mathews v. Eldridge* factor—

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[2] Dr. Shubin was the sole physician performing a physical examination in six of the eight cases in which physical signs consistent with sexual abuse were found, and was the more experienced physician in a joint examination in a seventh case. Petitioner at no time questioned Dr. Shubin's credentials, who was also the sole physician offered to testify to findings of physical signs consistent with sexual abuse in *Maryland v. Craig*, No. 89-478, Brief for Petitioner at 11, and *Morgan v. Foretich*, 846 F.2d 941, 943 (4th Cir. 1988).

the risk of an erroneous deprivation of an interest through the procedures used and the probable value of additional procedural safeguards—respondents repeat the argument of the court below that cross-examination of the therapists testifying for the State is good enough, while avoiding the court's reasoning based upon the assumption that children do not lie. Appendix 26a-27a. That argument has been discussed in the Petition (at 20-23) and need not be discussed again. In analyzing the third *Mathews v. Eldridge* factor, the government's interest in maintaining the existing procedures, respondents simply contradict themselves. They argue that the State must protect the children from the further anxiety a psychological interview would cause "even if there would be less emotional trauma in a psychological interview than in a cross-examination", but insist that petitioner should have subpoenaed the children. Assuming that existing procedures would allow the issuance of subpoenas to force three-and four-year-old children to testify at a hearing, the State has no interest in maintaining the status quo, because, as respondents admit, a change would mean the adoption of a less traumatic alternative.

3. Respondents' final argument is that petitioner waived her due process rights by not requesting that the hearing officer subpoena the children to testify at the hearing. As noted by the court below, however, petitioner sought psychological examinations of the children, not interrogation by counsel at the hearing.[3]

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[3] The State of Maryland has identified the problems of in-hearing testimony by small children in its Brief for Petitioner in *Maryland v. Craig, cert. granted* 58 U.S.L.W. 3443 (U.S. Jan. 16, 1990) (No. 89-478).

Appendix 21a-22a n.6. Respondents concede that interviews by petitioner's medical experts would be less traumatic than testimony at a hearing. And testimony of psychologists who had conducted interviews (which under the better practice are recorded) are more likely to get at the truth than testimony of the children at a hearing. Consequently, petitioner should not be deemed to have waived her right to psychological interviews merely by not availing herself of the less reliable and more traumatic alternative.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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